(20,686.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 294.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Petition for Writ of Error.

To the Honorable the Judges of the Circuit Court of the United State for the Second Circuit:

Comes now the above named defendant and complains that in the record and proceedings lately had in the above entitled cause on an indictment for alleged violations of the Act of February 19, 1903, entitled, "An Act to Further Regulate Commerce with Foreign Nations and Among the States," and in the judgment and sentence therein rendered against this defendant on the 22nd day of November, 1906, manifest error hath intervened to the great damage of this defendant, as by reference to the said record and proceedings and the assignment of errors herewith filed will more fully and at large appear.

Wherefore this defendant prays for the allowance of a writ of error, and for such other orders and process as may cause all and singular the said record and proceedings in the said cause to be sent to the Supreme Court of the United States, so that, the same
2 being inspected, the said Supreme Court may cause further to be done in the premises, to correct such error, what of right and according to the law and custom of the United States ought to be done; and that the said writ of error may be made a supersedeas, and that execution of the judgment in this cause and all proceedings therein may be superseded and stayed pending the final determination, judgment and mandate of the said Supreme Court.

And your petitioner will ever pray.

Dated, New York, March 30th 1907.

ALBERT H. HARRIS,
Attorney for the Defendant-Petitioner, 417 Grand Central Station, Manhattan, New York City, N. Y.

(Endorsed:) United States Circuit Court, Southern District of New York.—The United States of America, *vs.* The New York Central and Hudson River R. R. Co.—Petition for writ of error.—Albert H. Harris, Attorney for Petitioner, 417 Grand Central Station, Manhattan, New York City, N. Y.—U. S. Circuit Court, Southern District New York, Filed Mar. 30, 1907, John A. Shields, Clerk.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States of America and the New York Central and Hudson River Railroad Company, wherein judgment was rendered on the 22nd day of November last past, a manifest error hath happened, to the great damage of the said Company, as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 27 day of April 1907, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and

4 custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 30 day of March, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal of U. S. Circuit Court, South. Dist., New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed. Let the same operate as a supersedeas upon the filing with the Clerk a good and sufficient bond for damages and costs, in the sum of eighteen thousand dollars ($18,000.00).

E. H. LACOMBE,
United States Circuit Judge.

5 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from one to 137 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of the New

York Central and Hudson River Railroad Company, plaintiff-in-error, against the United States of America, defendant-in-error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of April in the year of our Lord, one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal of U. S. Circuit Court, South. Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

6 [Endorsed:] E. & O. E. 2571. United States Supreme Court. The New York Central and Hudson River R. R. Co., Plaintiff-in-error, *vs.* The United States of America, Defendant-in-error. Writ of error. U. S. Circuit Court. Filed Apr. 1 1907. Southern District, New York. John A. Shields, Clerk. Albert H. Harris, Attorney for plaintiff-in-error, 417 Grand Central Station, Manhattan, New York City, N. Y. A copy of [Illegible] this day [Illegible] Apr. 1, 19—. Henry L. Stimson, U. S. Attorney. E. 145 m.

7 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the City of New York, within and for the District and Circuit aforesaid, on the fourteenth day of March, in the year of our Lord one thousand nine hundred and six, and continued by adjournment to and including the 24th day of March, in the year of our Lord one thousand nine hundred and six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Jurors of the United States of America within and for the District and Circuit aforesaid, on their oath present, that at the times hereinafter mentioned, the New York Central & Hudson River Railroad Company, was and still is a railroad corporation duly organized under and existing by virtue of the Laws of the State of New York and engaged in the transportation of passengers, freight and property for hire, by railroad, on and by its own lines and routes and by arrangement with divers and sundry other connecting railroads, for a continuous carriage and shipment under a common control, management and arrangement, from the City of New York, by way of the Southern District of New York to the City of Cleveland, in the State of Ohio, and beyond; and at all such times the said New York Central and Hudson River Railroad Company was a common carrier subject to the provisions of an act of Congress approved February 4th, 1887, entitled "An Act to Regulate Comerce" and of the

acts amendatory thereof and supplemental thereto, and was engaged in the transportation of many different kinds of freight and property in interstate and foreign commerce.

That at all the times so as aforesaid mentioned the said New York Central & Hudson River Railroad Company had complied with the provisions of the said acts of Congress by printing and keeping open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property which, as a common carrier, it had established and which were in force at such times upon its various lines and routes, by posting the same in its depots and stations, and by filing copies thereof with the Interstate Commerce Commission, and by notifying the said Commission of all changes made in the same, in accordance with the provisions of said acts.

That at all the times herein mentioned the rates set forth in said tariff or schedule, so filed and published as aforesaid, from New York City, by way of the Southern District of New York, as aforesaid, to Cleveland, in the State of Ohio, upon property of the character and the kind and class herein referred to, was twenty-one cents for each one hundred pounds thereof, which said rate or schedule of twenty-one cents was the rate charged, demanded, collected and received by the said New York Central Hudson River Railroad Company from other persons than "The American Sugar Refining Company," below mentioned, for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned.

8 That at all the times herein mentioned the said "The American Sugar Refining Company" was a corporation organized and existing under and by virtue of the Laws of the State of New Jersey.

And the jurors aforesaid, on their oath aforesaid, do further present, that on the 20th day of November, in the year of our Lord nineteen hundred and two, the officers and agents of the said "The American Sugar Refining Company," acting within the scope of their employment by the said company, induced the said New York Central & Hudson River Railroad Company to enter into an unlawful agreement and arrangement with the said "The American Sugar Refining Company," whereby it was agreed that, in the event of the said "The American Sugar Refining Company" shipping a portion of its products over the lines and routes aforesaid from the City of New York in the State of New York, to the City of Cleveland, in the State of Ohio, and paying to the said New York Central & Hudson River Railroad Company the full rates and charges named in said schedules as common carrier as aforesaid, that is to say, twenty-one cents on each one hundred pounds so shipped and transported, the said New York Central & Hudson River Railroad Company would allow a rebate to the said "The American Sugar Refining Company" of six cents for each one hundred pounds of sugar so shipped and transported to the City of Cleveland, in the State of Ohio, for reconsignment to points beyond said city, and a rebate of

four cents for each one hundred pounds of sugar shipped and transported, as aforesaid, to said City of Cleveland, to go no further; the said sums in such cases, respectively, to be refunded from the lawful amounts paid, as aforesaid, according to the tariff schedules aforesaid of twenty-one cents for each one hundred pounds of such shipments and transportations.

And it was then and there agreed by and between the said companies, that, thereafter upon any and all shipments of sugar, as aforesaid, the said "The American Sugar Refining Company" should present its claims to and upon the said railroad company for rebate and drawback, under the agreement aforesaid, and the same should be paid by the said railroad company to the said "The American Sugar Refining Company," thereby reducing the tariff of twenty-one cents per each one hundred pounds in and by the amounts of six cents, or four cents, for each one hundred pounds, respectively, as the case might be.

And under the aforesaid agreement and arrangement the said "The American Sugar Refining Company" made divers and various consignments of sugars over the said New York Central & Hudson River Railroad Company's lines, and the lawful tariff rate scheduled at twenty-one cents per each one hundred pounds by said railroad company, as aforesaid, was duly paid, according to said agreement, by the said "The American Sugar Refining Company" to the said railroad company, and the said sugars were actually shipped and transported under the said agreement over the said railroad company's lines, by way of the Southern District of New York, as aforesaid, to Cleveland, in the State of Ohio, and points beyond; and thereafter divers claims for rebate and drawback for and on account of said sugars, transported as aforesaid, were presented by the said "The American Sugar Refining Company" to the said railroad company for payment, but the amount of each claim, its items and the time of its presentation, as aforesaid, are to the jurors unknown.

That on the second day of April, in the year of our Lord, Nineteen hundred and three, the said New York Central & Hudson River Railroad Company, at the Southern District of New York, and within the jurisdiction of this Court, paid and caused to be paid, to the said "The American Sugar Refining Company," by way of rebate and drawback, the sum of Twenty-six thousand one hunder and forty-one dollars and eightey-one cents ($26,141.81) for and on account and by way of, the rebate and drawback hereinbefore set forth and agreed to, by and between the said companies, for the reduc-
9 tion of the said tariff schedules as aforesaid, said rebate and drawback being so paid upon the claims aforesaid and in respect to the sugar shipped and transported as aforesaid.

And so the jurors aforesaid, on their oath aforesaid, do say that the said New York Central & Hudson River Railroad Company, a corporation and common carrier as aforesaid, in manner and form and by means aforesaid, in and by the aforesaid payment of Twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81), as aforesaid, to the said "The American Sugar Refining Company," as aforesaid, by way of the rebate and draw-

back, as hereinbefore recited, within the jurisdiction aforesaid, on the said second day of April, in the year of our Lord Nineteen hundred and three, did unlawfully and wilfully violate the provisions of the said act to regulate commerce and the acts amendatory thereof, in that the said New York Central & Hudson River Railroad Company then and there did take, receive and collect, of and from the said "The American Sugar Refining Company" in and for the transportation of its said freight and property, as aforesaid, a less compensation for said services rendered than the said New York Central & Hudson River Railroad Company charged, demanded, collected and received from other persons for doing for them like and contemporaneous services, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, and so was then and there guilty of unjust and unlawful discrimination; and did unlawfully offer, grant and give a rebate, concession and discrimination in respect to the aforesaid transportation of said freight and property, in interstate commerce; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States, in such case made and provided.

Second Count.

And the jurors aforesaid, on their oath aforesaid, do further present, that, at the times hereinafter mentioned, the New York Central & Hudson River Railroad Company, was and still is a railroad corporation duly organized under and existing by virtue of the Laws of the State of New York and engaged in the transportation of passengers, freight and property for hire, by railroad, on and by its own lines and routes and by arrangement with divers and sundry other connecting railroads, for a continuous carriage and shipment under a common control, management and arrangement, from the City of New York, by way of the Southern District of New York, to the City of Cleveland, in the State of Ohio, and beyond; and at all such times the said New York Central and Hudson River Railroad Company was a common carrier subject to the provisions of an act of Congress approved February 4th, 1887, entitled "An Act to Regulate Commerce" and of the acts amendatory thereof and supplemental thereto, and was engaged in the transportation of many different kinds of freight and property in interstate and foreign commerce.

That at all the times so as aforesaid mentioned the said New York Central & Hudson River Railroad Company had complied with the provisions of the said acts of Congress by printing and keeping open to public inspection schedules showing the rates, fares and charges for the transportation of passengers and property which, as a common carrier, it had established and which were in force at such times upon its various lines and routes, by posting the same in its depots and stations, and by filing copies thereof with the Interstate Commerce Commission, and by notifying the said Commission of all changes made in the same, in accordance with the provisions of said acts.

That at all the times herein mentioned the rates set forth in said tariff or schedule, so filed and published as aforesaid, from New York

City, by way of the Southern District of New York, as aforesaid, to Cleveland, in the State of Ohio, upon property of the character and the kind and class herein referred to, was twenty-one cents for each one hundred pounds thereof, which said rate or schedule of twenty-one cents was the rate charged, demanded, collected and received by the said New York Central & Hudson River Railroad Company from other persons than "The American Sugar Refining Company," below mentioned, for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned.

That at all the times herein mentioned the said "The American Sugar Refining Company" was a corporation organized and existing under and by virtue of the Laws of the State of New Jersey.

And the jurors aforesaid, on their oath aforesaid, do further present, that prior to the second day of April, in the year of our Lord nineteen hundred and three, the said New York Central & Hudson River Railroad Company accepted for transportation from the said "The American Sugar Refining Company" certain sugars to be transported from the said City of New York, by way of the Southern District of New York, to the City of Cleveland, in the State of Ohio, over the lines and routes aforesaid, and received payment therefor from the said "The American Sugar Refining Company," at the rate of twenty-one cents for each one hundred pounds thereof; and such payment was at the regular published tariff rates for such freight, as published and filed with the Interstate Commerce Commission by the said New York Central & Hudson River Railroad Company on merchandise of the character aforesaid; and the said railroad company having so transported the said sugars from the said City of New York, by way of the Southern District of New York, as aforesaid, at and in the said District and within the jurisdiction of this Court, on the said second day of April, in the said year, did unlawfully and wilfully offer, grant and give to the said "The American Sugar Refining Company" the sum of Twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81) as and for an unlawful rebate, concession and discrimination.

And so the jurors aforesaid, on their oath aforesaid, do say that the said New York Central & Hudson River Railroad Company, a corporation and common carrier as aforesaid, in manner and form and by means aforesaid, in and by the aforesaid payment of Twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81), as aforesaid, to the said "The American Sugar Refining Company," as aforesaid, by way of the rebate, concession and discrimination, as hereinbefore recited, within the jurisdiction aforesaid, on the said second day of April, in the year of our Lord nineteen hundred and three, did unlawfully and wilfully violate the provisions of the said act to regulate commerce and the acts amendatory thereof and supplemental thereto, in that, the said New York Central & Hudson River Railroad Company then and there did take, receive and collect, of and from the said "The American Sugar Refining Company" in and for the transportation of its said freight and

property, as aforesaid, a less compensation for said services rendered than the said New York Central & Hudson River Railroad Company charged, demanded, collected and received from other persons for doing for them like and contemporaneous services, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, and so was then and there guilty of unjust and unlawful discrimination; and did unlawfully offer, grant and give a rebate, concession and discrimination in respect to the aforesaid transportation of said freight and property, in interstate commerce; against the peace of the United States and their dignity, and contrary to the form of the statute of the United States, in such case made and provided.

HENRY L. STIMSON,
U. S. Attorney.

11 (Endorsed:) U. S. Circuit Court.—The United States of America, *vs.* The New York Central & Hudson River Railroad Company.—Indictment. Unlawfully granting rebate in violation of the act to regulate commerce I Supp. 525, 687 & 32 Stat. 23, 26.—Henry L. Stimson, U. S. Attorney.—A True Bill, Robert N. Bolton, Foreman.—U. S. Circuit Court, Southern District New York, Filed Mar. 24, 1906, John A. Shields, Clerk.—May 9, 1906. Deft. pleads not guilty with leave to withdraw on 21st inst. June 29, 1906. Demurrer argued. July 28, 1906. Order overruling demurrer Sept. 17, 1906, Albert H. Harris, att'y pleads not guilty on behalf of N. Y. C. & H. R. R. R. Nov. 14. Trial Commenced. Nov. 15, Trial concluded. Verdict, Guilty. Nov. 22. Def't sentenced to pay a fine of $18,000.

12 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Unlawfully Granting Rebate, &c., 1 Supp., 525, 687, and 32 Stat., 847.

And the said The New York Central and Hudson River Railroad Company cometh into Court here, and having heard the said indictment read says, that the same, and the matters therein contained in manner and form as the same are therein stated and set forth, are not sufficient in law, and that it is not bound by the law of the land to answer the same; and it is ready to verify.

And for specific and special causes of demurrer to the said indictment, the defendant Company assigns the following objections thereto:

1. The acts described and set forth therein do not constitute a crime under the laws of the United States.

2. The acts described and set forth in the first count thereof do not constitute a crime under the laws of the United States.

3. The acts described and set forth in the second count thereof do not constitute a crime under the laws of the United States.

4. The said indictment does not, nor does either of the counts thereof, apprise the defendant company with reasonable certainty of the nature of the accusation against them.

5. The said indictment does not, nor does either of the counts thereof, charge the time, place, nature and circumstances of the offense sought to be alleged with clearness and certainty.

Wherefore, for want of a sufficient indictment in this behalf, the said defendant Company prays judgment, and that by the Court it may be dismissed and discharged from the said premises in the said indictment specified.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By NATHAN GUILFORD, *Vice-President.*

13 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Nathan Guilford, being duly sworn, deposes and says that he is a Vice-President of the defendant Company above named, that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact, as he is advised by counsel and verily believes.

NATHAN GUILFORD.

Subscribed and sworn to before me, this 19th day of May, 1906.

ALBERT B. QUENCER,
[SEAL.] *Notary Public, N. Y. County.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

ALBERT H. HARRIS,
AUSTEN G. FOX,
JOHN D. LINDSAY,
Of Counsel for the said Defendant Company.

(Endorsed:) Circuit Court of the U. S., Southern District of N. Y.—The United States of America against The New York Central and Hudson River Railroad Company.—Demurrer.—U. S. Circuit Court, Southern District New York, Filed May 22, 1906, John A. Shields, Clerk.

14 United States Circuit Court, Southern District of New York.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY and NATHAN GUILFORD.

UNITED STATES
vs.
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, NATHAN GUILFORD and FRED S. POMEROY.

UNITED STATES
vs.
NATHAN GUILFORD, FRED L. POMEROY, C. GOODLOE EDGAR, and EDWIN EARLE.

Henry L. Stimson, U. S. Attorney, William S. Ball, J. Osgood Nichols, and Henry A. Wise, Assistant U. S. Attorneys for the United States.

Austen G. Fox and John D. Lindsay, for the defendants, the New York Central &c. Co., Nathan Guilford and Fred L. Pomeroy.

Michael H. Cardoza and Howard S. Gans for the defendants C. Goodloe Edgar and Edwin Earle.

These are demurrers to four indictments. The indictments
15 are based on alleged violations of the Act to Regulate Commerce passed February 4, 1887, commonly called the Inter State Commerce Act, and the various acts amending and supplementing it, including the Act of February 19, 1903, commonly called the Elkins Act. Three of the indictments charge a giving or taking of rebates in violation of such act, and one a conspiracy to commit an offense against the United States by inducing the giving and taking of a rebate in violation of such act. The demurrers were argued at the same time and will be considered together.

The indictment against the New York Central and Hudson River Railroad Company contains two counts. The first count charges in substance that the defendant was a railroad corporation engaged in the transportation of freight for hire over its own and connecting roads, between, among other points, New York and Cleveland, Ohio; that its freight schedule, published as required by the Interstate Commerce Act, fixed the rate for freight on sugar from New York to Cleveland at 21 cents per 100 pounds; that on November 20, 1902, the officers of the American Sugar Refining Company, a New Jersey corporation induced the defendant to enter into the unlawful agreement to allow the sugar company a rebate of 5 cents per 100 pounds on sugar shipped by it to Cleveland for reconsignment to further

points, and 4 cents per 100 pounds on sugar shipped to Cleveland to go no further; that the sugar company shipped various consignments of sugar under said agreement over defendant's road and con-
16 necting roads to Cleveland and paid the schedule rate of 21 cents per 100 pounds; that afterwards claims for rebate on said shipments were presented by the Sugar Company to the defendant, upon which on April 2, 1903 the defendant paid to the Sugar Company by way of rebate $26,141.81. The Second count is substantially the same as the first except that the allegations of a preliminary agreement to pay rebates is omitted. The demurrer to this indictment alleges in substance that the acts set forth in the indictment and in each count thereof do not constitute a crime under the laws of the United States and that the indictment is not sufficiently definite and certain.

The principal objection to this indictment urged by the defendant's counsel is that the charge made in both counts that an unlawful discrimination was made in favor of the Sugar Company against other persons, is not sufficiently pleaded because no other person is named who was charged a larger rate, and reliance is put on the case of United States *v.* Hanley, 71 Fed. Rep. 672. In that case it was held in substance that the Interstate Commerce Act prohibited discriminations in rates between shippers and also deviations from the scheduled rates; that if an indictment was based on alleged discriminations between different shippers it was not enough to show that a particular shipper was charged less than the scheduled rate but the indictment must allege that some other person designated in the indictment had been charged a higher rate. The Court held that as the Company might make an equal reduction to everybody
17 from the scheduled rate, an allegation that a rebate from the scheduled rate had been returned to a particular shipper was not a sufficient allegation of an unlawful discrimination. If it were necessary to base the decision of this demurrer upon this point, I should hesitate to follow the decision in United States *v.* Hanley. I think that if a railroad company receives from a shipper the full schedule rate, and then repays him a percentage of the amount paid as a rebate, there is weighty ground to hold that it is presumptively guilty of illegal discrimination under the act, and that if in fact the railroad company has pursued the extremely improbable course of making an uniform reduction of its rates to everybody while retaining a higher rate on its published schedules no substantial injustice will be done any defendant if he is left to prove that fact as part of his defense. But without passing definitely upon this question it is sufficient to say that the case of United States *v.* Hanley also held that the payment of a rebate from the scheduled rates violated the provisions of the act prohibiting deviations from the published rates. The allegations of this indictment certainly support that charge sufficiently. In my opinion the indictment is sufficiently definite and specific and I think the demurrer to it should be overruled.

The indictment against the New York Central and Hudson River Railroad Company and Nathan Guilford charges in substance that

at all the times stated in the indictment the Railroad Com-
18 pany's scheduled rate on sugar from New York to Detroit,
Michigan, was 23 cents per 100 pounds; that the defendant Guilford was the defendant's traffic manager; that on October 15, 1902, Lowell M. Palmer and Thomas P. Riley, acting as agents of the American Sugar Refining Company and of the firm of W. H. Edgar & Son of Detroit, induced the Railroad Company and Guilford to agree to pay a rebate of 2 cents per 100 pounds on all sugar shipped by the Sugar Company to Edgar & Son; that shipments were thereafter made and the scheduled rates paid; that thereafter on May 14, 1903, the defendants paid to said Palmer as such agent $920.39 as a rebate. The grounds of demurrer to this indictment are that it is insufficient in law and that the acts set forth in it do not constitute a crime. The objections urged in its support by counsel are that it does not properly allege that any discrimination resulted; that it does not allege any wilful failure by the Railroad Company to observe the published tariff; and that the individual defendant is improperly joined with the corporation. The point of failure to properly allege discrimination I have already discussed under the first indictment considered; the fact that the indictment alleges that the full schedule rate was first paid to the Railroad Company and that there after $920.39 was paid by the defendants to Palmer as agent for the shippers "by way or rebate and concession in respect to the transportation of said sugars under said unlawful
agreement" is in my opinion a sufficient allegation that the
19 payment was a wilful failure to observe the published tariff;
and as the Interstate Commerce Act as amended and the Elkins Act provide that the corporation and its agents may be criminally liable for giving rebates I do not see why these defendants cannot be prosecuted for the same offense in one indictment. I think therefore that the demurrer to the indictment against the Railroad Company and Guilford should be overruled.

The indictment against the New York Central and Hudson River Railroad Company, Nathan Guilford and Fred L. Pomeroy is in substance similar to the one against the Railroad Co. and Guilford and the objections taken to it in the demurrer and the agreement of counsel are similar to the objections taken to the indictment in that case. I think therefor- that the demurrer to this indictment should be overruled.

The indictment against Nathan Guilford, Fred L. Pomeroy, C. Goodloe Edgar and Edwin Earle, differs essentially from the three other indictments. It is an indictment for an alleged conspiracy under Section 5440 of the United States Revised Statutes. This indictment charges in substance that the New York Central and Hudson River Railroad Company was engaged in the transportation of freight for hire over an interstate route to Detroit, Michigan, by its own and connecting lines; that it had published a schedule of rates over this route, under the Interstate Commerce Laws; that the rate for sugar from New York to Detroit was 23 cents per 100 pounds;
that the American Sugar Refining Company and the Ameri-
20 can Sugar Refining Company of New York were corporations
engaged in selling and shipping sugar from New York over

said route; that the defendants Edgar and Earle with one James E. Edgar now deceased, were a firm doing business in Detroit under the style of W. H. Edgar and Son; that the defendants Guilford and Pomeroy were traffic managers of the Railroad Company; that Palmer and Riley were agents both for the Sugar Companies and for Edgar & Son; that on April 1, 1904, at the Southern District of New York, the said Guilford, Pomeroy, James Edgar, C. Goodloe Edgar and Earle, with other persons to the jurors unknown, conspired with each other and with said Palmer and Riley to commit an offense against the United States by causing and procuring the said Railroad Company to give rebates on sugar shipped by the Sugar Companies at New York to Edgar & Son at Detroit over the said route; that it was agreed by said conspirators that a rebate should be given on such shipments of 5 cents per 100 pounds; that sugars were so shipped, the carriage paid for at the scheduled rates, claims made for rebates, and the rebates paid by said Guilford and Pomeroy acting in behalf of said Railroad Company to said Palmer and Riley acting in behalf of said Sugar Companies and Edgar & Son. The indictment also alleges as acts done to effect the object of the conspiracy that a letter was written by Pomeroy to Palmer stating the details of the agreement for rebates; that in July and August, 1904, Edgar & Son purchased certain sugars from the Sugar Companies which Palmer and Riley caused to be shipped to them at
21 Detroit and paid for at the tariff rates; and that subsequently claims for rebates were presented and certain checks paid for such rebates, one check for $2,474.54 dated October 28, 1904, and one for $1,979.64 dated October 29, 1904.

Various objections under the demurrer are taken to this indictment. In my opinion the most serious of these objections is the claim that Congress having by the Elkins Act expressly abolished imprisonment as a penalty for any offense committed under the Acts to regulate Commerce, an indictment will not lie for a conspiracy to commit such an offense which is an offense punishable by imprisonment.

Section 5440 of the United States Revised Statutes, under which this indictment is brought, provides as follows:

"If two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and wh-n one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the Court."

The 10th section of the Interstate Commerce Act as amended, previous to the Elkins Act, provided that any common carrier, or, when it was a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for such corporation, who should be convicted of the offense of an unlawful discrimina-
22 tion in rates should be liable to a fine not to exceed $5,000. or to imprisonment not exceeding two years or both. Any such carrier or person who by false billing, classification, weighing or

other device should wilfully assist or willingly permit any person to obtain transportation for property at less than the regular rates should be subject to the same punishment of fine and imprisonment. False billing by shippers or inducing carriers to discriminate unjustly was subject to the same punishment. But the Elkins Act passed in 1903, abolished the punishment of imprisonment in such cases, and substituted for it a heavier fine than that authorized by the Interstate Commerce Act. The punishment for the wilful failure of a carrier to file and publish the rates required by the Act was made a fine of not less than $1,000. and not more than $20,000. It was made unlawful for any person or corporation to offer, grant or give, or to solicit, accept or receive any rebate concession or discrimination, and the same punishment was fixed, a fine not less than $1,000. and not more than $20,000. The Act then provides as follows:

"In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce, whether committed before or after the passage of this Act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished."

23 Section 4 of the Act also provides "that all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed."

It is impossible to deny that Congress intended in the Elkins Act to abolish the penalty of imprisonment for the offense of giving or taking rebates and to substitute for the previous punishment a much heavier fine than that which could be inflicted under the Interstate Commerce Act. If therefore the offense charged in this indictment is essentially the same offense as that created and punished in the Interstate Commerce Acts and the Elkins Act, this indictment in my opinion cannot be maintained. If Congress has made a certain action an offense and prescribed its punishment, the Courts cannot, by giving it some other name, increases the punishment. The question in this case therefore is whether the offense charged in the indictment as constituting the crime or conspiracy differs from the offense described in the Interstate Commerce Acts and the Elkins Act as the giving and receiving of rebates punishable by a fine.

In most cases, undoubtedly, a conspiracy to commit a crime is a distinct offense from the commission of the crime itself. This is true, of course, of all crimes committed by one person, for two persons at least are necessary for a conspiracy. Even if more than one person commits the crime there may be others engaged in a conspiracy to have it committed who do not take part otherwise in the commission of the crime. But there are certain crimes which

24 require for their commission the concurrent action and cooperation of more than one person. Such crimes as rioting, or duelling or bigamy, for instance, cannot be perpetrated by one person, and persons who do not perpetrate them might take part in a conspiracy to cause them to be done. But when the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it and to do it, it seems difficult to

claim that their agreement to act is in law a conspiracy, and their act, a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it. The claim that the agreement to give it is a conspiracy punishable by imprisonment, while the actual giving it is an offense only punishable by a fine seems to me too subtle a distinction to be drawn in the administration of criminal law.

This view is not without authority to support it. In each of the cases of Shannon *v.* Commonwealth, 14 Penn. 226, and in Miles *v.* State, 56 Alabama, 390, a man and woman were indicted for a conspiracy to commit adultery with each other. It was held in each case that the conspiracy was the same thing as the substantive offense and the indictments were quashed.

25 Wharton, in commenting on these cases, says:

"When the law says a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name, it is not lawful for the prosecution to call it by some other name; and when the law says such an offense—*e. g.* adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable, and hence, persons combining to induce others to commit bigamy, adultery, incest or duelling do not fall within this exception, and may be indicted for conspiracy." (Wheaton's Crim. L. Sec. 1339.)

In Regina *v.* Boulton, 12 Cox. Cr. C. 93, Chief Justice Cockburn says:

"I am clearly of the opinion that when the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiracy to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused. The prosecutors are thus enabled to combine in one indictment a variety of offenses, which, if treated individually, as they ought to be, would exclude the possi-

26 bility of giving evidence against one defendant to the prejudice of others."

In United States *v.* Dietrich and Fisher, 126 Fed. Rep. 664 the indictment charged that the defendants entered into a conspiracy to commit an offense against the United States, by agreeing that Dietrich, a member of Congress, should procure the appointment of Fisher as postmaster, and that Fisher should pay to Dietrich therefor a certain sum of money as a bribe. The Court held that the indictment was bad, and, in the opinion, said:

"The making of such an agreement is not a conspiracy within the terms of Section 5440, but is a several and substantive offense

under Section 1781 upon the part of each of the parties, and this without the doing of any overt act in pursuance thereof. * * * As the transaction is stated in the indictment it was Dietrich who agreed to accept the bribe, not Dietrich and Fisher, and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to federal office, nor is it that two or more members of Congress agreed among themselves to obtain from another person a reward or compensation for their services or aid in securing such an appointment. * * * The agreement or transaction stated in the indictment was immediately and only between two persons, one charged with the intended
27 taking and the other with the intended giving of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses defined in Section 1731, of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of acquiring, receiving or giving. * * * Because concert and plurality of agents, in the sense we have hereinbefore shown, are essential to each of the offenses—there are two, not one—the commission of which is charged to have been the object of this so-called conspiracy, and because no other concert and plurality of agents are here charged, we are of opinion that the acts described in this indictment do not constitute a conspiracy under Section 5440."

And see Chadwick *v.* United States, 141 Fed. Rep. 225, 236 where the Dietrich case is cited with approval.

The counsel for the Government assert that the Dietrich case is to be distinguished from this case because in the Dietrich case but two persons, the giver and taker of the bribe, were charged with the conspiracy in the indictment, while in the case at bar the indictment charges that seven persons named and others to the jurors unknown were parties to the conspiracy. But only four of the seven persons named are indicted, and of those four Guilford and Pomeroy
28 represent simply the giver and Edgar and Earle simply the receiver of the rebate. The Government's counsel also claims that the bribery statute makes agreeing to give or receive a bribe an offense while the statutes prohibiting rebates does not in terms prohibit an agreement to give or receive a rebate. But they do prohibit an offer of a rebate or the solicitation of a rebate; and when such an offer or solicitation is acceded to by the opposite party, which the indictment alleges occurred in this case, an agreement is entered into. In short the Dietrich case seems to me, in its essential nature, strictly analogous to this case. The facts alleged in the indictment in the case at bar as steps taken to effect the object of the conspiracy are the same facts which it would be necessary to prove to sustain an indictment for giving and receiving rebates. On the trial of such an indictment the government would not make out a

case by simply proving the payment of the check. It would have to prove that the check was given in payment of a rebate. To establish that proposition it would be necessary to prove the agreement to give a rebate, the shipment of sugars, the payment of the full scheduled rates of freight, the filing of the claims for rebate, and the payment of such claims as rebate. Without proof of these facts these defendants could not be convicted of the crime of giving or taking rebates; with such proof, they could. They would thereupon be liable to be punished by the fines prescribed by the Elkins Act and by no other punishment, and especially not by im-
29 prisonment, which penalty for such a crime is specifically abolished by the Elkins Act. In my opinion, it is not in the power of the Government, by calling the same acts a conspiracy, to indict these defendants for a different crime, and to thereby subject them to the liability of imprisonment for acts for which such punishment was expressly abolished by the Elkins Act.

Since writing this opinion my attention has been called to an act to amend the act to regulate commerce and all acts amendatory thereof, which was approved on June 29, 1906, the day on which these demurrers were argued. That act amends Section 1 of the Elkins Act by striking out the provision abolishing the punishment of imprisonment for offenses under the Acts to regulate Commerce, and inserting in lieu thereof a provision "that any person, or any officer or director of any corporation subject to the provisions of this act or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment in the discretion of the court." This provision, upon general principles, and by the express terms of the 10th section of the act is not retrospective, and does not make any person liable to the punishment of imprisonment for such offenses committed before the passage of the recent act; but
30 it authorizes the inference that in the opinion of Congress, without such an amendment, no punishment by imprisonment for such offenses could be imposed.

My conclusion is that the demurrers to the three indictments for giving or receiving rebates should be overruled, and the demurrer to the indictment for conspiracy should be sustained.

G. C. H.

(Endorsed:) Circuit Court of the United States, for the Southern District of New York.—United States *vs.* New York Central and Hudson River Railroad Company (and three other cases)—Opinion, Holt, J.—U. S. Circuit Court, Southern District of New York, Filed Jul- 6, 1906, John A. Shields, Clerk.

31 At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the Borough of Manhattan, in the City of New York, on the 26th day of July, in the year of our Lord one thousand nine hundred and six.

Present: Hon. Chas. M. Hough, Dist. Judge.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

The above-entitled cause coming on to be heard upon the demurrer to the indictment filed on the 22nd day of May A. D. 1906, and being argued, pro and con, by counsel for the respective parties, on the 29th day of June of the same year, upon the issues of law joined therein, the court was of the opinion that the said demurrer should be overruled and the said opinion, in writing, was filed in the Clerk's Office of said Court on the 6th day of July in the year of our Lord one thousand nine hundred and six,

Now, therefore, on motion of Henry L. Stimson, Attorney for the United States, it is

Ordered, adjudged and decreed, that the said demurrer, pursuant to and in accordance with the said opinion, be, and the same is hereby overruled, with leave to the defendants to plead over, which they are required to do, at a Special Session of said Court to be held on the 17th day of September, 1906, in the New York Court House and P. O. Building.

CHAS. M. HOUGH,
U. S. Dist. Judge, Holding Circuit Court

32 (Endorsed:) U. S. Circuit Court, Southern District of New York.—The United States of America, *vs.* The New York Central & Hudson River Railroad Company.—Order.—Henry L. Stimson, United States Attorney, Attorney for U. S. A.—U. S. Circuit Court, Southern District New York, Filed Jul- 26, 1906, John A. Shields, Clerk.

33 WEDNESDAY, *Nov.* 14*th*, 1906.

The Court meets and is opened by proclamation.

Present: The Honorable George C. Holt, Judge.

U. S.
v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

E. 4190. Unlawfully Granting Rebate in Violation of the Act to Regulate Commerce. 1 Supp., 525, 687. 32 Stat., 23-26.

On motion of U. S. Attorney ordered trial.

Mr. J. D. Lindsay moves to quash indictment, argument made by A. G. Fox. Motion denied.

Jurors Sworn.

1. Edwin J. Gallies.
2. Charles C. Hughes.
3. Ignatius L. Lersuer.
4. Morris V. Mason.
5. George W. Ruddell.
6. Charles J. Rose.
7. Fred. R. Downes.
8. Chas. Moore.
9. Morris B. Nixon.
10. John A. Oakley.
11. Carl E. Peck.
12. Bowan W. Pierson.

H. A. Wise, Asst. U. S. Atty. opens case on behalf of prosecution. Motion to quash renewed and denied.

Evidence on Behalf of Prosecution.

Geo. T. Roberts sworn
Allan McMichael "
Fred E. Hurst "
Lowell M. Palmer "
Wm. F. Wilson "
Harry T. Leeming "

Government rests.
Adjorned to Nov. 15th, 1906.

34 THURSDAY, *November 15th*, 1906.

The Court meets and is opened by proclamation.
Present: The Hon. Geo. C. Holt, Judge.

U. S.
v.
NEW YORK CENTRAL & HUDSON RIVER R. R. Co. (Continued).

E. 4190. Continued from Nov. 14th.

Mr. A. G. Fox moves to acquit deft. Mo. denied.
Motion to direct a verdict acquitting deft. Mo. denied.
Mr. J. H. Choate appears by permission of the Court to argue a motion to quash the indictments in the cases of the U. S. *v.* American Sugar Refining Co. E. 4191 and U. S. *v.* N. Y. Central & Hudson River Railroad Co. (Now on trial) E. 4190. Motion denied.
Defendant rests.
Mr. A. G. Fox sums up for deft.
Mr. H. L. Stimson sums up for prosecution.
The charge is thereupon delivered by the court to the jury who retire in charge of an officer duly qualified to attend them and upon their return say they find the defendant Guilty. Adjd. to Nov. 20th for sentence.

35 THURSDAY, *November* 22, 1906.

The Court meets and is opened by proclamation.
Present: The Hon. Geo. C. Holt, Judge.

E. 4190.

U. S.
v.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

A. G. Fox on behalf of deft. moves to set aside the verdict and for a new trial. Motion denied.

On motion of U. S. Attorney ordered the sentence.

A. G. Fox on behalf of defts. moves for an arrest of judgment. Motion denied.

The Court thereupon proceeds to pass judgment and sentences the defendant to pay a fine of eighteen thousand (18,000.00) dollars.

Mr. Fox moves for a stay of sixty days within which to perfect an appeal, and for a stay of sixty days of execution of judgment. Motions granted.

36 Circuit Court of the United States, Southern District of New York, in the Second Circuit, October Term, 1906.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Bill of Exceptions.

The issues in this action came on for trial at a stated term of this court begun and held in the City of New York within and for the District and Circuit aforesaid, on the 10th day of October, 1906, and continued by adjournment to and including the 14th day of November, 1906, before the Honorable George C. Holt, one of the United States District Judges for the Southern District of New York, who had been theretofore duly assigned to hold the said term.

The Government appeared by Henry L. Stimson, Esquire, Attorney for the United States for the District aforesaid, and Henry A. Wise, Esquire, Assistant United States Attorney. The defendant appeared by Albert H. Harris, Esquire, its attorney of record, and Messrs. Austen G. Fox and John D. Lindsay, of counsel.

The Government having moved the case for trial, the defendant moved for an order quashing the indictment as appears by the record, and to the Court's denial of the motion the defendant excepted.

A jury was duly impanelled and sworn, whereupon the defendant renewed its motion to quash upon each of the grounds therein stated. The motion was again denied and the defendant excepted.

The defendant then moved that the jury be directed to acquit the

defendant on the ground that the indictment was insufficient and defective for each of the following reasons:

37 "(1) The Act of February 19, 1903, known as the Elkins Law, on which the indictment is based, was enacted in excess of the power to regulate commerce with foreign nations and among the several States and with Indian tribes conferred upon the Congress by section 8 of Article I of the Constitution of the United States and is unconstitutional and void in that it undertakes to impose and prescribe unreasonable, unequal and unjust regulations of interstate commerce, that is to say, it subjects carriers engaged in interstate commerce by means of the transportation of property from places in one State to places in another State by railway lines or routes, or partly by railway line or routes and partly by water, to rules, regulations, restrictions, pains, penalties and punishments which are not imposed upon carriers engaged in interstate commerce in competition with such railway, or part railway and part water lines or routes, by means of the transportation of the same kind of property between the same places, by means of water lines or routes.

(2) The said Statute is an unreasonable, unjust and unequal regulation of interstate commerce, and is unconstitutional and void in so far as it undertakes to punish this defendant for acts done by its agents while acting within the scope of their employment, which, if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with the defendant corporation by means of an all-water line or route, would be entirely innocent.

(3) The said statute is unconstitutional and void in that it seeks to deprive this defendant corporation of its property without due process of law in violation of Article V of the amendments to the Constitution of the United States, by subjecting it to the payment of a pecuniary fine, for acts committed by its agents within the scope of their employment in which this defendant did not in any manner participate, thus imputing to the said corporation, and punishing it criminally for acts which it did not in fact commit.

(4) The provisions of section 1 of the said statute, that in construing and enforcing its provisions, the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier, upon which provision the validity of this indictment wholly rests, so far as it relates to the defendant corporation, infringes the rights, privileges and immunities of this defendant corporation under Article V of the Amendments to the Constitution of the United States, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, and thus depriving it of property without due process of law; and the said provision is therefore unconstitutional and void.

(5) The Congress is without power, under the Constitution of the United States, to impute to this corporation the commission of a criminal offense and subject it to a criminal prosecution and punish-

ment by reason of the matters described and set forth in the indictment."

38 (6) The matters mentioned in the indictment, in the manner and form as the same are therein stated and set forth, are not sufficient in law, and that the defendant is not bound by the law of the land to answer the same.

(7) The acts described and set forth in the first count do not constitute a crime under the laws of the United States.

(8) The acts described and set forth in the second count do not constitute a crime under the laws of the United States.

(9) The first count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(10) The second count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(11) The first count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(12) The second count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(13) The first count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(14) The second count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(15) The Elkins Law did not and was not intended by the Congress to apply to the offering, granting or giving of rebates, concessions or discriminations in respect to the transportation of property in interstate or foreign commerce transported prior to the time when the said amendatory statute went into effect; but applied, and was intended to apply, only to the offering, granting or giving of such rebates, concessions or discriminations in respect to the trans-

39 portation of property transported in such commerce after the said amendatory statute went into effect; and inasmuch as it does not appear from anything alleged in the first count that the sum therein stated to have been paid by the defendant on April 2, 1903, for and on account and by way of a rebate and drawback was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the first count do not constitute any violation of the Elkins Law.

(16) For the same reason set forth in the last preceding paragraph, and inasmuch as it does not appear that the sum alleged in the second count, that the payment therein stated to have been paid by the defendant "as and for an unlawful rebate, concession and discrimination," was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the second count do not constitute any violation of the Elkins Law.

(17) The failure to allege the time when the shipments of sugar

mentioned in the first count were made, or to state whether the same were made before or after the going into effect of the Elkins Law, renders that count invalid since without such specification the defendant is not informed and the court cannot know the state of facts upon which the court will be called to apply the law of the case.

(18) For the same reason the failure to allege the time when the shipments of sugar mentioned in the second count were made, renders that count invalid.

(19) The payment by the defendant on April 2, 1903, of the sum in the first count alleged to have been paid for and on account and by way of a rebate and drawback did not constitute a viola-
40 tion of any statute or law of the United States at that time in force.

(20) The payment by the defendant on April 2, 1903, of the sum in the second count alleged to have been paid as and for an unlawful rebate, concession and discrimination, did not constitute a violation of any stat-e or law of the United States at that time in force.

(21) The facts set forth in the first count do not constitute a crime, since it is not alleged that the payment therein alleged to have been made by the defendant was made in respect of the transportation by the defendant of the sugars therein mentioned, or of any of the property, in interstate commerce.

(22) The facts set forth in the second count do not constitute a crime, since it is not alleged that the sum therein alleged to have been offered, granted and given by the defendant as and for an unlawful rebate, concession or discrimination, was offered, granted or given in respect of the transportation of property in interstate commerce, or that it was given in respect of any particular transaction or matter.

(23) The acts alleged in the first count do not constitute any violation of the Elkins Law by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(24) The acts alleged in the second count do not constitute any violation of the Elkins Law by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(25) The absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set
41 forth in the first count renders that count invalid.

(26) The absence of any allegation that advantage was given or discrimination practiced by reason of the matters set forth in the second count renders that count invalid.

(27) The acts alleged in the first count to have been done after the going into effect of the Elkins Law, constitute no violation of the provisions of that statute.

(28) The acts alleged in the second count to have been done after the going into effect of the Elkins Law constitute no violation of the provisions of that statute.

(29) The acts alleged in the first count do not constitute any vio-

lation of the Elkins Law in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

(30) The acts alleged in the second count do not constitute any violation of the Elkins Law in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

(31) This defendant is incapable of committing any crime by reason of the matters set forth in the first count.

(32) This defendant is incapable of committing any crime by reason of the matters set forth in the second count.

(33) More than three years have elapsed since the commission of any acts alleged in the indictment for which this defendant can be subjected to a criminal prosecution; and during all of said time the defendant has been a citizen inhabitant and actually resident of this District, and has been at all times within the jurisdiction of the court.

The Court denied the motion and the defendant excepted.

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Mr. Wise opened the case to the jury.

The defendant, asserting that the indictment was in respect to the matters presently indicated, indefinite and uncertain, and did not inform the defendant of the precise character of the crime which it sought to allege, then moved that the District Attorney be required to inform the defendant whether it was charged in the indictment with the giving of rebates under the Act of February 19, 1903, or with having wilfully failed strictly to observe the tariff rate under that Act; or whether the indictment charged the defendant with a violation of the Act of February 19, 1903, or of the Act to Regulate Commerce which the Act of February 19, 1903, amended and to a certain extent superseded.

The court denied the motion and the defendant excepted.

The defendant then asked the Court to inform the defendant what its view was as to the nature of the crime charged in the indictment, so that the defendant might proceed intelligently with the trial and with knowledge of the court's view in that regard.

The court refused to give such information, and the defendant excepted.

The Government to maintain the issues on its part then called as a witness GEORGE T. ROBERTS who testified:

I am assistant auditor of the Interstate Commerce Commission, and have charge of the tariffs and joint tariffs filed by common carriers engaged in interstate commerce in the United States. I have produced one of the tariffs filed by the New York Central and Hudson River Railroad Company and in effect during the year 1902. According to that tariff the rate on sugar in carload lots, in barrels and bags, from New York to Cleveland, over the New York Central and Hudson River Railroad and the Lake Shore and Michigan Southern Railroad in effect during the year 1902, was twenty-one cents per one hundred pounds. That was the only rate in effect on sugar over those roads during that year that I

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know of. That tariff was cancelled by another on January 1, 1903.

The tariff from Yonkers to Cleveland over the New York Central and Hudson River Railroad Company and the Lake Shore and Michigan Southern on sugar in carload lots, barrels or bags, during the year 1902 was twenty-one cents. The New York rate as named in this tariff applies on St. John's Park Station; Pier 4, East River; Barclay Street Station; 33rd Street Station; 60th Street Station, North River; from sugar refineries; from Palmer's Dock, foot of North 6th Street, Brooklyn, E. D.; from the foot of Bridge Street, Brooklyn, and from forwarding stations of Brooklyn Wharf and Warehouse Company, Brooklyn; from Long Island City,
44 N. Y., where coming from points beyond on Long Island Railroad; from Warren Street, Jersey City; also from stations on the Hudson Division of the New York Central and Hudson River road. That tariff as filed does not include a map of the lighterage district of New York. New York did not include Yonkers. The District Attorney then offered in evidence that part of the tariff produced by the witness in reference to the rate from New York City to Cleveland and from Yonkers to Cleveland, and the same was received in evidence and marked Exhibit 1.

The defendant here admitted (for the purpose of the trial only) that the following facts had been established on the part of the United States beyond a reasonable doubt:

At all the times mentioned in the indictment the New York Central and Hudson River Railroad Company was, and still is, a railroad corporation duly organized under and existing by virtue of the laws of the State of New York, and was engaged in the operation of lines of railway extending from the City of New York to the cities of Buffalo and Niagara Falls, all of which cities are in the State of New York, and was at all the said times a common carrier engaged in the transportation of passengers, freight and property for hire over the said lines of railway between the places last before mentioned.

At all of the said times the Lake Shore and Michigan Southern Railway Company was, and still is, a corporation duly organized and existing under the laws of the State of New York, and was engaged in the operation of a line of railway connecting with that of the aforesaid The New York Central and Hudson River Railroad Company at Buffalo, in the State of New York, and extending
45 from the said City of Buffalo, through the States of Pennsylvania and Ohio, to the City of Cleveland, in the State of Ohio, and at all the said times the said The Lake Shore & Michigan Southern Railway Company was a common carrier, engaged in the transportation of passengers, freight and property for hire over its said lines between the said last mentioned places.

That at all the said times The New York Central and Hudson River Railroad Company and the Lake Shore and Michigan Southern Railway Company had jointly established and were operating a continuous fast freight line or route known as the "Red Line" from the said City of New York in the State of New York, over the railroads aforesaid, by way of the Southern District of New York to the

City of Cleveland in the State of Ohio, and were engaged as common carriers in transporting freight on through way bills over said continuous line or route.

At all the said times the said The New York Central and Hudson River Railroad Company had established and had filed with the Interstate Commerce Commission and had published a joint tariff of the rates, fares and charges for the transportation of passengers and property over the aforesaid continuous line or route from the said City of New York to the said City of Cleveland, and the said The Lake Shore & Michigan Southern Railway Company had filed with the said Interstate Commerce Commission a written concurrence in the said joint tariff, and the said joint tariff so as aforesaid filed, published and concurred in by the said railroad companies plainly stated the places upon the said railroads, between which property and passengers would be carried, and contained the classification of freight at said times in force.

46 At all the times mentioned in the indictment the rates set forth in the said joint tariff so established, filed, published and concurred in, as aforesaid, to be charged for the transportation from the said City of New York to the said City of Cleveland over the said continuous line and route upon carload shipments of sugar in barrels or bags was twenty-one cents for each one hundred pounds thereof.

At all the times mentioned in the indictment The American Sugar Refining Company was a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

That between the 24th day of July, 1902, and the sixth day of December, 1902, the various consignments of sugar mentioned in the indictment, amounting to 69,944,966 pounds of such sugars, were delivered by the American Sugar Refining Company to the said The New York Central and Hudson River Railroad Company, for shipment in carload lots, in bags or barrels, and the said sugars were prior to January 1st, 1903, transported by a continuous through haul and movement on through waybills, said waybills being in the form annexed, over the said continuous line or route known as the "Red Line" from the said City of New York to the said City of Cleveland, and prior to that date the full tariff rate thereon, and no more, was paid by The American Sugar Refining Company.

That thereafter, and prior to January 1, 1903, Lowell M. Palmer, purporting to act on behalf of the said The American Sugar Refining Company, filed claims with the said The New York Central & Hudson River Railroad Company for the sum of six cents for each one hundred pounds of sugar so shipped and transported, as

47 aforesaid, over the said continuous line or route, to the said City of Cleveland, for re-consignment to points beyond said City, and for the sum of four cents for each one hundred pounds of the sugar so shipped and transported, as aforesaid, over the said continuous line or route, to the said City of Cleveland to go no further; the said claims were so filed on January 13th, 1903, and bore the following serial numbers and were for the following amounts:

Numbers.	Amounts.
30240	$2,254.18
30562	11,201.08
30975	10,707.81
31530	5,608.29
31874	9,672.94

That on the 27th day of March, in the year of our Lord one thousand nine hundred and three, the said The New York Central and Hudson River Railroad Company, in the Southern District of New York, gave to the said Lowell M. Palmer, on account of the said claims above mentioned, a draft to his order for the sum of $26,141.81, which was liquidated out of the funds of said Railroad Company.

Mr. Wise then offered in evidence the waybill referred to in the admission, and the same was received, without objection, and marked Exhibit 2.

Further to maintain the issues on its part the Government called as a witness ALAN MCMICHAEL, who after testifying that he was chief clerk to F. L. Pomeroy, the freight traffic manager of the New York Central and Hudson River Railroad Company, produced and identified certain papers which were marked for identification Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, respectively.

Being cross-examined by Mr. Fox the witness testified:

William H. Newman was the president of the defendant in
48 1902 and 1903. He had a private secretary named William Hutchinson. There were five or six vice-presidents of the defendant during that period. The freight department handled a very large volume of freight, involving the making of a vast number of contracts all the time, and involving the carriage of a great many different kinds of freight. There was also a Board of Directors of the defendant numbering a dozen or more during that period controlling the corporate action of the defendant.

The defendant here admitted (for the purposes of the trial only) that the following facts were proven beyond a reasonable doubt; that is to say:

That at a regular meeting of the Executive Committee of the Board of Directors of The New York Central and Hudson River Railroad Company, held September 28th, 1887, Nathan Guilford was duly appointed General Traffic Manager of The New York Central and Hudson River Railroad Company, and that he continued in such position until May 11th, 1898, when he was duly appointed at a regular meeting of the Board of Directors of said Company to be General Freight Traffic Manager, and that as such General Freight Traffic Manager he was charged with the general supervision of all freight traffic matters of said Company, that he held such position and performed said duties from thenceforth until February 1st, 1905.

That subject to the approval of the Executive Committee of the Board of Directors, the President of the said Company had at all the

times mentioned in the indictment general power to appoint such officers and assistants as he might require, who should perform such duties as from time to time might be assigned to them by him; that at no time had the Board of Directors, or the Executive Com-
49 mittee, or the President of said Company, by any resolution or executive order, created any such position as Assistant General Traffic Manager, or Assistant General Freight Traffic Manager, or Assistant Freight Traffic Manager; that on February 1st, 1901, Mr. Fred L. Pomeroy, was, by said Nathan Guilford, Traffic Manager, appointed Assistant Traffic Manager of said Company, and that said appointment was made with the sanction of the President; and from February 1st, 1901, to June 30th, 1904, said Fred L. Pomeroy was recognized by the said company and its officers as such Assistant Traffic Manager, but that no resolution of the Executive Committee or Board of Directors had ever been adopted creating such position or expressly ratifying such appointment.

That at the times mentioned in the indictment said Nathan Guilford, as General Freight Traffic Manager, and said Fred L. Pomeroy, as Assistant Freight Traffic Manager, or Freight Traffic Manager, were authorized to establish rates at which freight should be carried over the line of the New York Central and Hudson River Railroad Company, and to unite with other companies in the establishment, filing and publishing of through rates, including the through rate or rates between New York and Cleveland referred to in the indictment.

The defendant further admitted that certain papers then produced by the District Attorney were correct copies of resolutions of the Company, and the same were offered and received in evidence and marked Exhibits 13, 14, 15, 16 and 17 respectively.

The defendant further admitted that there were no minutes of the stockholders, directors, or Executive Committee, or executive
50 orders, since September 28th, 1887, other than Exhibits 13, 14, 15, 16 and 17, creating any of the before-mentioned positions or defining the functions and duties of such officers; and that the Guilford and Pomeroy mentioned in the foregoing admission and exhibits were the same Guilford and Pomeroy mentioned in the papers which had been produced by the witness McMichael, marked for identification Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

The Government further to maintain the issues on its part called as a witness FRED E. HURST who testified:

During 1902 and 1903 I was employed in the Sales Department of the American Sugar Refining Company, which was engaged in the refining and selling of sugar and in the shipping of sugar to various parts of the country, and among other places, to Cleveland, Ohio. I looked after the routing and the shipments from the Wall Street office, handled the orders that came in and looked after the fixing of the freight basis. I received instructions from Lowell M. Palmer's office at 184 Front Street, as to the route over which the sugar was to be shipped and the rate which it was to pay.

The Government further to maintain the issues on its part called as a witness LOWELL M. PALMER who testified:

During 1902 and 1903 I was one of the directors of the American Sugar Refining Company. I furnished to the sales department the rates at which sugar were to be shipped from New York by the Company over the different railroads. In the course of my business I routed and arranged the rate for pretty nearly all the shipments for the refineries of the Company which were situated either in
51 Brooklyn or Jersey City. It was also a part of my business to collect claims against the different railroads that handled this freight. I think the collection of these claims was entirely taken care of in my office. I had conducted this business and stood in this position with the Company during a long period of years and ever since its formation, and during all those years shipments were made by the Company according to the rates I made. My business was conducted at 184 Front Street. Thomas F. Riley was the head of the office under me. I had several clerks—W. J. Whitaker, F. M. Muench and H. P. Leeming. I had a bank account with the Market and Fulton Bank, in which it was my habit to deposit collections from the different railroads. I had no personal interest in that bank account. In 1902 and 1903 the rent and stationery, the salaries of these different employees, and other expenses of the business were paid out of that account. I have had occasion to discuss rates over the New York Central and Hudson River Railroad Company with Messrs. Guilford and Pomeroy, the Freight Traffic Manager and Assistant Freight Traffic Manager of that Company, and have arranged rates over that road with them. Those rates have subsequently been carried out by the railroad company. In 1902, the American Sugar Refining Company made large shipments to a warehouse in Cleveland, Ohio, known as the Merwin Street Warehouse. I remember having had an interview with Mr. Pomeroy in July, 1902, on the subject of shipments to that warehouse. I think the interview took place at his office. I could not state positively who was present. Exhibit 12 for identification is a memorandum of that interview. It was made in duplicate immediately after the interview at the office of Mr. Pomeroy. I have read Exhibit 12 for identification. It embodies the arrangement correctly.

52 The District Attorney offered the memorandum in evidence and it was received and marked Exhibit 12.

The WITNESS (continuing): I do not think I can state, absolutely, every one of the items of that agreement without the use of the memorandum. I can state them approximately. At that interview on July 24th, 1902, I stated to Mr. Pomeroy that commencing with about 1898 or 1899, we had made a contract with the Cleveland Steel Canal Boat Company for shipments of sugar by all-water route to Cleveland, that the agreement was in force until some time in 1902, and that they failed to keep their agreement. The boats didn't arrive in New York Harbor in time to make the shipments in accordance with the wants of the American Sugar Refining Company. There was at times very little sugar in the Cleveland warehouse, so

that customers could not be supplied, and that did damage to about $3,000. resulting in a lawsuit in which the American Sugar Refining Company, unfortunately was the defendant. I asked Mr. Pomeroy, after relating these circumstances, to make an all-rail rate that would enable us to continue our business at Cleveland. The fact is I thought he had a perfect right to make the rate in
53 competition with an all-water rate. Mr. Pomeroy listened to what I had to say. I think that is all that took place that I can remember. I cannot answer whether Mr. Pomeroy called in a stenographer and dictated a memorandum of the interview at that time in my presence. It might have been done that way. He may have written it out in a little memorandum himself. How it was done I couldn't answer, I do not remember any more of the facts which were discussed between me and Mr. Pomeroy than what I have just stated. I think that is all.

The WITNESS (continuing): The signature at the end of Exhibit 11 for identification is mine. I wrote that letter. Exhibit 18 for identification is the reply to it.

The defendant admitted that the signature "N. Guilford" to Exhibit 18 for identification was the signature of Nathan Guilford. The District Attorney offered Exhibits 11 and 18 for identification in evidence and the same were received and marked Exhibits 11 and 18 respectively.

The WITNESS (continuing): Mr. T. P. Riley was the Mr. Riley I have mentioned. He was present at that interview. No one
54 else representing the Sugar Company was there. I know that the regular tariff rate on July 24th, 1902, was 21 cents. I was in the lighterage business. That business represented an investment aggregating $4,500,000. We loaded the sugar when received from the refineries into cars, furnished tonnage for the loading of the sugar, and when loaded put the cars on floats and transported the cars to the *terminii* of the various trunk lines. It consisted of carrying the sugar from the docks in Brooklyn and Jersey City, where the refineries loaded the cars, to the terminals where the railroads desired them delivered. That business was carried on by me as a separate business. It had no connection with the Sugar Company. The firm of Havemeyer & Elder were my partners in that business. Mr. H. O. Havemeyer, one of the members of the firm, was the President of the Sugar Company on July 24th, 1902. The 4 1/5 cents lighterage mentioned in Exhibit 12 was a compensation which I received for transporting the shipments of sugar from the docks to the terminals on business west of Buffalo, Suspension Bridge, Niagara Falls, or Pittsburg. If on business up to those points, and east thereof, the rate was 3 cents. 4 1/5 cents was the regular charge I received in my lighterage business for transporting in lighters sugar destined for Cleveland. The net result of
55 this arrangement as to lighterage was that I was to receive 3 cents per 100 pounds for transporting the sugar from the docks in Brooklyn or Jersey City to the railroads. In other words, I was to be paid 4 1/5 cents per 100 pounds by the Central and 1 1/5

cents was to be paid back to them; and I thought it was fair, when I was asking the New York Central in making a rate in competition with the water rate, to carry that for a lower rate than provided in the contract, namely 3 cents, but it being very difficult to figure these Cleveland shipments by themselves, it was suggested that it go in as provided in the contract and render the contract price each month, and then I handed back that amount each month, in view of the competition they were making on the all-water rate. The American Sugar Refining Company received an allowance for cartage or transfer on all all-rail shipments of sugar for points anywhere in the United States, so that at that time, whenever it shipped sugar by rail from New York to points west it received back 2 cents per 100 pounds; and the arrangement mentoned in my letter involved the American Sugar Refining Company giving up that allowance. My understanding of the arrangement is that a claim was to be made by me under the 5th clause of the memorandum for 6 cents from the 21 cents mentioned in the 1st clause. No overcharge over the published tariff was contemplated. Mr. Guilford was away on July 24th when this arrangement was made with Mr. Pomeroy. The letter I wrote to him on November 18th (Exhibit 11) was my way of submitting to him the question which was left open by the arrangement. After his return I received Exhibit 18 which was his reply to my letter. No further correspondence in regard to the subject left to him took place after this The sugar mentioned in the
56 interview and in these lettes all came from the American Sugar Refining Company at Brooklyn and Jersey City. The endorsement on the back of the draft now shown me is the stamp that was used in my office in 1902 and 1903, and the Market & Fulton Bank mentioned in the endorsenent is the bank in which I had the account regarding which I have testified. That account is the only one I had in that bank.

The draft was marked Exhibit 19 for identification.

Being cross-examined by Mr. Foxthe witness testified: During all the time to which my attention has been directed there was an all-water route from New York and from Brooklyn to Cleveland, and by that route the American Sugar Refining Company was shipping very largely in 1900 and 1901. In 1902 the Company shipped something over 18,000 tons by water routes, and I think that was continued through at least a part of1903. All this sugar, the transporting and alleged overcharge in regard to which is involved in this indictment was put into cars onland within the limits of Brooklyn, on the West Shore road, the place on shore where the sugar was put into the cars was three blocks from the water front; on the New York Central one block. And thenin every instance that sugar was carried in those cars to Cleveland without change. I never had any conference or conversation on this subject with any officer of the defendant except Mr. Guilford and Mr. Pomeroy. I am inclined to think there was a conference with Mr. Guilford before he went away, but that is a matter of impression, and I cannot at this time testify definitely to any conference with anyone except Mr. Pomeroy. I

testified to all that I recollect on the subject when I testified
57 as to what took place between Mr. Pomeroy and myself. I think there was a conversation with Mr. Guilford, but it did not cover any arrangement. I never had any letter from the President or officer of the defendant relating to this matter except the letter from Mr. Guilford (Exhibit 18), and I never showed Mr. Guilford's letter to any officer of the defendant.

The defendant here admitted (solely for the purposes of the trial, however) that the claims referred to in the defendant's previous admissions were, after being audited, destroyed in the regular course of business, and were not then available either to the Government or to the defendant, that these claims were audited by the different auditors representing the lines against which the claims were made, and in the case of a claim against the New York Central and Hudson River Railroad Company were audited by a travelling auditor representing that Company; and that the claims referred to were stated to be, and on their face purported to be, claims for overcharges at the rate of 6 cents for each 100 pounds of shipment.

The Government, further to maintain the issues on its part called as a witness HARRY T. LEEMING who testified: In 1902 and 1903 I was in the office of Lowell M. Palmer. I remember certain claims that were prepared against the New York Central and Hudson River Railroad Company.

The defendant here admitted that the claims referred to by the witness were made up by him, in the ordinary course of his duty, in accordance with Mr. Palmer's understanding as to the amount, and were presented to the defendant by Mr. Palmer, that they were subsequently withdrawn and re-adjusted in accordance with Mr. Guilford's final determination and that the payment of $26,141.81 represented by Exhibit 19 for identification was a payment on
58 account of these claims, readjusted on the basis of 6 cents per 100 pounds for all shipments which went to Cleveland, and were re-consigned to points beyond, and 4 cents on the sugar that was delivered locally in Cleveland, and that Exhibit 19 for identification was liquidated out of the funds of the defendant.

The District Attorney offered in evidence Exhibits 3, 4, 5, 6 and 9 for identification, which letters defendant admitted to be letters from the office of Lowell M. Palmer.

The defendant objected to their admission on the ground that the declarations of the witness Palmer were irrelevant and inadmissible under any allegations of the indictment. The objection was overruled and the exhibits were admitted and marked Exhibits 3, 4, 5, 6 and 9, respectively. The defendant excepted.

The District Attorney offered in evidence a letter dated March 23, 1903, from the witness Palmer to Mr. Pomeroy which had been produced by the defendant. The defendant objected to the admission of the letter on the ground that Palmer's declarations were irrelevant and inadmissible as against the defendant. The objection was over-

ruled and the letter was admitted and marked Exhibit 20. The defendant excepted.

The District Attorney offered in evidence a copy of a letter produced by the defendant the original of which defendant admitted was addressed to L. M. Palmer, and signed F. L. Pomeroy, dated Nov. 24th, 1902, and another copy of a letter produced by defendant dated March 21st, 1903, the original of which defendant admitted was addressed to L. M. Palmer and signed F. L. Pomeroy. The defendant objected to their admission on the ground that the declarations of Mr. Pomeroy were irrelevant and inadmissible to bind it, that no authority was shown on the part of Mr. Pomeroy to bind the defendant by any unlawful act, and that Mr. Pomeroy's
59 declarations were irrelevant and inadmissible on the question of the guilt of the defendant.

The objection was overruled and the two papers were admitted and marked Exhibits 21 and 22, respectively. The defendant excepted.

Mr. Wise read to the jury Exhibits 3, 4, 5, 6, 7, 9, 20, 21 and 22.

The examination of the witness Leeming being resumed he testified further: I was familiar with all these claims as to which letters have just been read. I handled those claims. I prepared them on the readjusted basis referred to in the letter from Mr. Pomeroy. At the time I prepared these claims I did not have any evidence before me of any loss or damage on account of these shipments, nor did I have anything before me showing that any amount had been paid on account of any of the shipments in excess of the tariff rate.

The District Attorney offered in evidence Exhibit 19 for identification. The defendant conceded that the exhibit was the draft mentioned in its admission, and was liquidated out of the funds of the defendant. The draft was received in evidence, marked Exhibit 19, and read to the jury.

60 The Government here rested.

The defendant moved that the jury be directed to acquit the defendant upon the ground that the court was without jurisdiction to punish the defendant for any offense toward which the evidence was addressed or alleged in the indictment, it appearing by the evidence that the transportation of all the goods mentioned in the indictment, or as to which any evidence had been adduced was begun and completed before the passage of the Act of February 19, 1903, that at the time the transportation was made and completed it was not a criminal offense for a corporation to give or pay a rebate, or do any of the acts referred to in the indictment, or as to which any evidence had been adduced; and that the Act of February 19, 1903, did not apply and was not intended to apply to any of the acts therein specified, done or omitted in respect of the transportation of property in interstate commerce at any time prior to its taking effect, but applied and was intended to apply only to the acts therein specified when the same should be done or omitted

in respect of the transportation of property in interstate commerce after its taking effect.

The court denied the motion, saying:

"I have considered this law and I do not think that I need hear the District Attorney upon it. I concur with the counsel who has spoken in the fundamental proportions put forward. No corporation could be proceeded against criminally before the Elkins Act, and therefore this prosecution must find its justification in the provisions of the Elkins Act. And of course the general proposition of law is fundamental that no person can be held for a crime except
the crime is established by law, and in the United States
61 court by statute, and affirmatively no legislation, particularly
criminal legislation, should be held to be retrospective. The question is as to the language of the Elkins Act. The first sentence is this: 'That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under the said Act or under this Act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Act or by this Act with reference to such persons except as such penalties are herein changed.'

Now under the Interstate Commerce Act, one of the provisions of the Sixth Section is this: 'It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon, than is specified in the schedule filed with the Commission in force at the time.'

In the Tenth Section it is made a misdemeanor for any common carrier subject to the provisions of the Act—meaning an individual common carrier—'or whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, who
alone or with any other corporation, company, person, or
62 party, shall wilfully do or cause to be done, or shall willingly
suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful."

Therefore, by this First Section, any act done by a corporation which, if done by any director or officer thereof, would be a misdemeanor, is made by the first sentence a misdemeanor. Upon the evidence in this case under the Interstate Commerce Act it would be a proper question for the jury whether Mr. Guilford or Mr. Pomeroy had not committed a misdemeanor, and therefore, by this first provision in the Elkins Act in my opinion it is a question for the jury whether the corporation upon the same evidence has not committed a misdemeanor, and particularly in view of the provisions in

the second paragraph of the Act that: 'In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person, acting for or employed by any common carrier acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person.'

Mr. Guilford and Mr. Pomeroy were acting within the scope of their employment. They were Traffic Managers of the road and they had authority by virtue of their general position to make contracts for traffic. They were, therefore, the persons for whose acts, in accordance with the provisions of this act, the corporation was responsible, and unless there is something in the subsequent provisions of the Elkins Act affecting the specific language of this first sentence, I do not see why that first sentence does not of itself create a misdemeanor which would be complete and perfect if there was nothing else added to the Act. Of course, there may be
63 something later which would affect it, but if not that is one view.

Then comes this second sentence: The wilful failure upon the part of any carrier subject to said act to file and publish the tariffs and rates and charges as required by said act, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the crime is fixed.

That is a complete sentence, a complete provision and constitutes a complete act of Congress as though passed separately and alone, and in my opinion there is evidence in this case to go to the jury as to whether there has been a wilful failure on the part of this carrier to strictly observe the tariffs published, at the time that the rebate was paid.

I think, therefore, on these first two grounds there is sufficient evidence in this case to go to the jury.

Then comes the provision which has been particularly adverted to: It shall be unlawful for any person, persons, or corporation, to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce. So far there is nothing with reference to the future. 'In Interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariff published and filed by such carrier as is required by said Act to regulate commerce and the acts amendatory thereto.' *Whereby any such property shall be transported at a less rate than that named.* That is by means of a rebate, con-
64 cession or discrimination any such property be by any device taken or transported at a less rate. In my opinion the words: 'Shall be transported' do not relate to the future of the transportation. They relate to the determination of the question after the rebate is paid whether it produces a less rate than that named in the tariff. That is the rebate, concession or discrimination, the various words used there mean to cover any form in which it may

be attempted to bring about a payment of a less rate than the tariff rate, and the sentence means, in my opinion that when this payment of rebates or discrimination is given effect to, if then, taking those facts into consideration, the result is that the property has been transported at a less rate than that named in the tariff, then the giving of such rebate constitutes a misdemeanor under that Act.

The phrase beginning: 'Whereby any such property shall be transported,' don't relate to the transportation of the property. It relates to the rebates which are to be given in my opinion. The whole legislation upon the subject treats the payment of the rebate as the essential crime. Perhaps the charging of the making of an agreement under this act, or the charging of the demand of payment by the carrier under the previous act, and the transportation of the property under a contract to give a rebate is not made an offense, or is not prohibited. The Chesapeake & Ohio case, and the case Mr. Choate referred to, of the Texas Pacific against Mugg all held that a contract of that kind made to give a rebate is not illegal and the parties can go on and ship the goods and if they pay the full rate there is nothing illegal so far in that notwithstanding they have made a previous contract and the road can demand the full payment if it sees fit, and that the making of the previous contracts are annul-ed by the operation of the law, even if accepted when made. So that it seems to me that the whole theory of this legislation is to make it an offense to pay a rebate, or to pay less than the schedule price. I do not see why Congress would not have power. Of course the difficulty of construing the statute as Mr. Choate suggested, as if it was an original act, is that there could not be any agreement about enforcing the schedule until there was some legislation to that effect. The original Act required that schedules should be posted, and this Elkin's Act is obviously an amendatory Act which leaves the original Act in full force except so far as it is changed, and the change it makes is to provide that a corporation will be proceeded against criminally which could not be done before, and that anybody proceeded against criminally shall be punished by a fine instead of the officers of the corporation by imprisonment, but the requirement to file a schedule exists today under the original act and not under this amendatory act, and it is perfectly competent in my opinion for Congress to have said by this Act it shall be a crime for any person who has shipped goods in the past and agreed to take a rebate on it, if you hereafter pay a rebate differing from the amount fixed by the schedules. I do not see why it is not competent to do so. I deny the motion on the ground you now state.

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The defendant excepted.

The defendant then moved that the court direct the jury to render a verdict of acquittal on each of the following grounds.

1. That there was no evidence in the case tending to show that at any time after the going into effect of the Act of February 19, 1903, there was any wilful failure on the part of the defendant strictly to observe the published tariff rate in re-

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spect of the transportation of any property which was transported after the going into effect of the Act.

2. That there was no evidence showing or tending to show that at any time after the passage of the Act the defendant was guilty of any violation of the Act in respect to the payment or giving or offering of any rebate made punishable under its provisions.

3. That there was no evidence in the case showing, or tending to show the commission within the Southern District of New York, or within the jurisdiction of this court, of any violation of the Act.

4. That the indictment charged no violation by the defendant of the Act, or of any other statute of the United States.

The court denied the motion and the defendant excepted.

The defendant here rested.

Counsel for the respective parties having summed up the case, the court charged the jury as follows:

Gentlemen of the jury:

The defendant in this case is indicted for a violation of the Act of 1903, commonly called the Elkins Act. That Act is an amendment of the Act of 1887 entitled an Act to Regulate Commerce, commonly called the Interstate Commerce Act and the Acts amending it.

The original Interstate Commerce Act provided that every common carrier carrying on commerce between the States, either alone or by a joint traffic arrangement with connecting roads,
67 should print and keep open for public inspection, schedules showing the rates of fares and charges for transportation of passengers and property which any such common carrier has established and which are in force at the time. There are various provisions in detail contained in the Act with reference to these schedules. They are to be filed in the office of the Commission of Interstate Commerce and posted in the stations of the roads, and deviation from these scheduled rates are declared to be illegal. When any such common carrier shall have established and published these rates, fares and charges in compliance with the provisions of this section the Act provides that "it shall be unlawful for such common carrier to charge, demand collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time."

Then the Act contains other provisions in regard to the prevention of making discriminations between shippers, but the original act did not provide that any railroad corporation could be indicted and criminally punished for any violation of its sections, but provided that any individual carrier could be, and that any officer or agent of any corporation who violated any of the provisions of this act could be proceeded against criminally. It provided for various civil proceedings, suits in equity and otherwise, against the corporation; some proceedings to be brought by the Interstate Commerce

Commission and some by suits at the instance of individuals who claimed to have been injured by the action of the corporation in violation of the act; but the original act did not contain any
68 provision under which the corporation as such could be indicted.

Then the Elkins Act was passed, which is to be regarded as an act amending the original act, and it provided in substance this: That any act done by an officer or agent of a railroad corporation, which would be a misdemeanor under the previous act if done by an officer or agent acting in the regular course of his employment, would be deemed to be a misdemeanor on the part of the corporation. Of course in the case of the defendant in this case, if a passenger agent or a person having nothing to do with the traffic department of the business should make a contract for rebates on the carriage of freight, the corporation would not be bound by it; but if the contract is made by an officer or agent of the company acting within the scope of his employment, the corporation is bound.

The Act says: "In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such carrier as well as that of the person."

So the first sentence or section provides that an act done by such officer or agent which would be a misdemeanor under the original act, shall be a misdemeanor by the corporation under the Elkins Act.

Then it provides in the second sentence or section that "the wilful failure on the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts or strictly to observe such tariffs until changed according to law,
69 shall be a misdemeanor," and then in the third sentence or section it provides that "It shall be unlawful for any person, persons or corporation to offer, grant or give or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto."

Now the indictment in this case charges in substance and the evidence tends to show, that the defendant The New York Central & Hudson River Railroad Company was a corporation and common carrier transporting merchandise from New York to Buffalo; that it had a joint traffic arrangement with the Michigan Central from Buffalo to Cleveland under which freight was shipped from New York to Cleveland under a through continuous bill of lading; that The American Sugar Refining Company, a corporation doing business in the neighborhood of New York with refineries in Brooklyn and Jersey City, through Mr. Lowell M. Palmer, one of its directors and a gentleman who was a member of the firm which had charge of

the business of fixing rates and traffic arrangements of the sugar sold or shipped by The American Sugar Refining Company, made an arrangement with Mr. Pomeroy, the Assistant Traffic Manager of the defendant, which was later modified by Mr. Guilford the traffic manager; that under that arrangement it was provided that all sugar that should be shipped to Cleveland should be shipped at the
70 regular tariff rate and paid for at that rate, and that there should be a rebate on all such sugars at the rate of 6 cents per 100 pounds. You will remember gentlemen the memorandum which has been read to you which Mr. Palmer said was made when they had this interview. He gave the grounds why he asked for the reduction of the rate, and said that thereupon it was conceded, and he said this memorandum was a correct statement of what was agreed upon at that time.

Among other provisions of this memorandum is this: Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on shipments of sugar to Cleveland as covered by the first clause in this memorandum on the basis of 6 cents per 100 pounds. The first clause states, shipments to be billed from New York regular tariff rate, of 21 cents per 100 pounds.

Now the evidence in the case is that subsequently a very large amount of sugar was shipped. I think the evidence is some 69,000,000 pounds. That computations were made of the overcharge as called here of 6 cents each 100 pounds and sent to the New York Central & Hudson River Railroad Company and that, after an examination by the proper officers and after correction of the amounts originally calculated, and some negotiations upon the subject, a check for some $26,000 was drawn and paid, which has been offered in evidence before you.

Now gentlemen, no evidence has been offered on behalf of the defendant in the case, and I understand from the argument of counsel that the defendant's defence in the case is the denial of any criminal intent. Gentlemen, intent is essential to the establishment of any charge of crime. Of course there may be legitimate
71 overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause. That is the simple question in this case for you to determine and that question I leave for you to pass upon upon the consideration of all the evidence in the case.

I have been handed a number of requests to charge in this case.

The defendant requests the Court to instruct the jury:

1. "That upon all the evidence it is the duty of the Jury to render a verdict of not guilty."

I decline to so charge.

2. "That in order to justify a verdict of guilty against this defendant it is not enough for the Government to prove that an agent or agents of the defendant offered to give or did give a rebate on sugar carried by this defendant."

I so charge, gentlemen, if this rebate was given for any legitimate purpose you will acquit the defendant, but if it was not given for any legitimate purpose, but was given as a pure rebate in violation of the law upon that subject, then you should convict the defendant, if you find the other elements of the case sufficient in other respects.

72 3. "That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors or any officer beyond the agent who gave the rebate, then the defendant should be acquitted."

I understand that to raise the point whether a corporation must be held criminally liable for the acts of its agents?

Mr. Fox: It means exactly what I have written and I think I am entitled to have it charged without modification or have it refused. I mean that is my position.

The Court: The Elkins Act provides in the language which I read to you that a corporation can be held criminally responsible if its officer would be held criminally responsible for the same act. "In construing and enforcing the provisions of this section the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission or failure of such common carrier as well as that of the person."

That is not the section I had in view. It is the first section. "That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under this Act shall also be held to be a

73 misdemeanor committed by such corporation."

That is the law applicable to this case and I therefore decline to charge this Third request as it is stated.

4. "That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation."

I decline to charge that in the language as put, on the ground of the section of the statutes which I have just read.

5. "That in order to prove that the defendant authorized the giving of a rebate it is not enough for the Government to prove merely the giving thereof by an agent or agents of the defendant together with the fact that thereafter certain claims were presented and paid

out of the corporation's treasury after transmission by certain agents in New York to other agents in Buffalo."

I so charge Gentlemen. It is not enough to prove simply the payment of money by the defendant. It must be proved beyond a reasonable doubt to your satisfaction that it was paid with a criminal intent to violate this law.

6. That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive offi-
74 cers, except said agent, then the defendant must be acquitted."

I decline to so charge.

7. "That it is not for the defendant to prove a negative and show that it did not authorize or know of the giving of a rebate, but it is for the Government to show such authority and to show it beyond a reasonable doubt, and no unfavorable inference must be drawn against the defendant because it called no witnesses."

I so charge.

8. "That the burden of proof is not upon the defendant to show affirmatively that no advantage was given in favor of or a discrimination practised against any shipper or consignee other than those named in the indictment, but the burden of proof is upon the Government to show that fact, if it be true."

Gentlemen, I charge you in that respect that you can find a verdict of guilty in this case if you find that the defendant received less than the published tariff rate, if the evidence establishes that fact in your opinion and the amount was received with the intention to contravene the provisions of the Interstate Commerce Act and the Acts amending it.

Mr. Fox: Does your Honor decline to charge No. 8 itself?

The Court: Well, "The burden of proof is not upon the defendant to show affirmatively that no advantage was given in favor of or a discrimination practised against any shipper or consignee other than those named in the indictment."

I charge that. The burden of proof is upon the Government to show that fact if it be true. I decline to charge in the lan-
75 guage put. If the Government establishes that this railroad company received less than its published rates with guilty intent, the jury can find a verdict of conviction whether there was any proof of discrimination, or any proof that any other person dealing in sugar was charged greater rates or not.

Mr. Fox: How much does Your Honor really charge? It seems to me in doubt.

The Court: I think you will have to read the report. I have tried to be exact.

Mr. Fox: You said you would not charge it as a whole and apparently did charge a part of it.

The Court: I said that I charged the part down to the word "Indictment," and the rest of it I do not charge in the language as stated.

9. "That the jury must not speculate or guess on the question whether any advantage was given to or discrimination practised against any shipper or consignee other than those named in the indictment and if the jury find as a fact that there is no evidence one way or the other on that question, then the defendant must be acquitted."

Well, I charge the first part of that down to the word "Indictment," and I refuse to charge the rest of it.

I refuse the next proposition as requested.

10. "That the Government having failed to prove that any advantage was given to any one mentioned in the indictment, or that discrimination was practised in favor of or against any other shipper or consignee by reason of the giving of the alleged rebate, the defendant must be acquitted."

I refuse so to charge.

11. "That before the jury can find this defendant guilty
76 of giving an unlawful rebate, they must find as a fact from the evidence and find beyond a reasonable doubt that in the giving of the alleged rebate the defendant did thereby give some advantage to or practised some discrimination in favor of or against some other shipper or consignee than the one mentioned in this indictment."

I decline to so charge.

12. "That the element of advantage or discrimination is an essential element of the crime of giving a rebate and as the indictment omits to allege this element it fails to charge a crime and the defendant must be acquitted."

I decline to so charge.

13. "That even if the jury find a criminal intent in an agent or agents of the defendant the jury cannot impute that intent to the defendant."

I decline to so charge.

14. "That the jury cannot make a finding of criminal intent against the defendant and base that finding solely on a finding of criminal intent in an agent or agents of the defendant."

I decline to so charge.

15. "That the defendant can in no event be convicted of a criminal intent to commit the crime of giving a rebate."

I decline to so charge.

16. "That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity or by direction of those controlling its corporate action it gave or authorized the giving of the rebate charged in the indictment."

I decline to so charge. If by the company this request is
77 meant that those controlling its corporate actions means any officer or person other than Guilford or Pomeroy.

17. "That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted."

I decline to so charge, understanding by the term those who control the corporate action to mean the Board of Directors, or the immediate officers other than Guilford and Pomeroy.

18. "That the defendant cannot be found guilty unless the evidence shows that sugar was carried for other shippers over the route named in the indictment on terms different from those given to the shippers named in the indictment."

I decline to so charge.

19. "That there is no evidence that sugars were carried for other shippers over the route between New York and Cleveland named in the indictment on terms different from those on which the sugars mentioned in the indictment were carried."

I think that is so gentlemen, but it is for you to say.

20. "That the jury cannot find the defendant guilty upon a finding that the defendant after the fact, ratified or approved of the giving of alleged rebates."

I decline to charge that request in the language in which it is put.

21. "That even if the jury find as a fact that an agent or agents of the defendant gave a rebate as alleged in the indictment and
78 that thereafter such rebate was paid by or through other agents of the defendant corporation in Buffalo, still these facts are not of themselves sufficient to warrant a verdict of guilty against the defendant."

Well, I will charge that. There must be proof sufficient to satisfy you of a guilty intent. If it is meant by that that the acts of Pomeroy are not sufficient and there must have been an action on the part of the Board of Directors I decline to so charge.

Mr. Fox: Are we not, with entire respect to The Court, entitled to have that proposition charged if it be sound and means just what it means, with no modification. Either charged or refused, because I do wish the jury to understand precisely where we stand.

The Court: I think I make it clear. I do not think it is unusual.

Mr. Fox: No, it is not. I am only speaking if I were a juror I would like to know whether Your Honor charges No. 21 as an absolute proposition of law or not.

The Court: I think I might be mistaken if I said I charged or refused to charge it without further comment, and I have commented upon it for the purpose of explaining the meaning which I gave to it, and I think it was entirely within the line of proper charging in that respect.

Mr. Fox: It was not a criticism but a prayer on my part. Your Honor declines to charge it as presented?

The Court: Yes, I decline to charge it as presented and I charge subject to the remarks which I have made about it.

22. "That there is no evidence that those who controlled the corporate action of the defendant authorized or knew of the
79 giving of the rebate alleged in the indictment."

I charge that if by controlling the corporate action is meant the directors or officers other than Guilford and Pomeroy.

23. "That there is no evidence that the defendant or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the government has asked.

I so charge.

24. "The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury."

I decline to so charge.

25. "That there is no presumption that any other shipper was refused the same rate that it is charged was given to the shipper mentioned in the indictment."

I so charge.

26. "That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy and that as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation then the defendant must be acquitted."

I decline to so charge.

27. "That in order to find that an agent or agents of the defendant was or were acting within the scope of his or their employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent or agents had authority to establish lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment."

I decline to so charge.

28. "There is no presumption that the defendant gave any of its agents authority to give any rebate, concession or discrimination charged in the indictment."

I so charge.

29. "The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment."

I decline to so charge. I do not think there is any legal presumption about it one way or the other.

30. "The presumption is that the defendant gave no direction or authority to any of its agents to commit an offense against the United States."

I decline to so charge. I do not think there is any question of presumption any way in the matter.

32. "The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States."

I decline to so charge, and leave it expressly to the jury.

34. "That in order to find the defendant guilty the jury must find that the evidence shows beyond a reasonable doubt that the defendant itself was guilty of a criminal intent separate and distinct from any criminal intent of any agent or agents of defendant whom the jury may find gave the rebate charged in the indictment."

I decline to so charge.

35. "That even if the jury find that some agent or agents of the

defendant gave the rebate charged in the indictment and acted with criminal intent in so doing, yet the jury must not impute
81 such criminal intent to the corporation merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant."

I decline to so charge.

36. "The defendant is entitled to the presumption of innocence and this presumption must be borne in mind in the consideration of every feature of the case."

I so charge.

37. "Even if the defendant can be guilty of a criminal intent, the jury cannot base a finding of such criminal intent solely on a finding of a criminal intent on the part of Fred L. Pomeroy."

I decline to so charge.

38. "The defendant cannot be convicted of a willful failure strictly to observe the published tariff rates by reason of anything done or omitted by it, or its agents, after the transportation of property was completed."

I decline to so charge.

39. "The alleged payment on April 2nd, 1903, did not constitute a failure on its part strictly to observe its published rate."

I decline to so charge. I leave that question to the jury.

40. "That the jury cannot find a verdict of guilty against the defendant, unless they find beyond a reasonable doubt that Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent."

I so charge.

41. "That if the jury entertain a reasonable doubt whether Nathan Guilford and Fred L. Pomeroy were guilty of any criminal intent then the jury must find a verdict of not guilty."

82 I so charge.

42. "That if the jury are unable to determine whether either Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent then the jury must find a verdict of not guilty."

I decline to so charge.

43. "That in determining whether Nathan Guilford or Fred. L. Pomeroy was guilty of any criminal intent the jury may take into consideration the fact there is no evidence that either one of them had any personal advantage to gain by the giving of the alleged rebate."

I so charge. Take it into consideration, gentlemen.

44. "That if the jury find as a fact that the language of the Elkin's Act is confusing, so far as it applies to the matters charged in the indictment, they may take that fact into consideration in determining the guilt or innocence of the defendant."

I decline to so charge.

45. "You must assume, there being no evidence to the contrary, that there were no "unpleasant incidents" of the transaction other than those which have been conceded by the defendant."

I so charge. You must find your verdict upon the evidence in the case, gentlemen.

Mr. Fox: I request Your Honor to charge: "46. You have a right

to take into consideration on the question of criminal intent the fact that if the payment had been made at any time before February 19th, 1903, when the Elkins Law went into effect, this defendant would not have been liable to indictment or prosecution therefor."

The COURT: Yes, I will so charge, that they can take it into consideration.

83 Before the jury retired and in their presence the defendant took the following exceptions to the charge:

Exception to the refusal to charge the first request submitted by the defendant.

An exception to the refusal to charge the second request submitted by the defendant and an exception to the modification made by the Court to the second request.

An exception to the Court's charging the jury that the provisions of the Act of 1887 on the subject of a deviation from the alleged tariff being illegal, and that part of the Act read by the Court to the jury therefrom, counsel for the defendant contending that the Elkins Act repealed the Act of 1887 so far as any transactions in this case are concerned.

An exception to the charge of the Court in substance as follows: If the contract was made within the scope of the employment of the agent the corporation is bound thereby.

An exception to the charge of the Court as follows: After stating that while there may be overcharges and payments that are innocent and proper giving rise to reclamation, the question is what was the intent with which the check of $26,000 was paid—Was it a pure rebate or was it given for some legitimate and proper overcharge?

An exception to the charge of the Court that if the payment was not for a legitimate purpose the jury should convict the defendant.

An exception to the charge of the Court that under the Elkins Act the defendant is criminally responsible for the act of the agent if the agent acted in the scope of his employment and the Court reading to the jury a clause from the Elkins Act in that connec-

84 tion, and reading also the first clause of the Elkins Act, and to the charge of the Court that that is the law applicable to this case.

An exception to the refusal of the Court to charge the third request to charge and to the modification thereof.

An exception to the refusal of the Court to charge the fourth request and to the modification thereof.

An exception to the refusal of the Court to charge the fifth request and an exception to the modification thereof.

An exception to the refusal of the Court to charge the sixth request submitted by the defendant.

An exception to the refusal of the Court to charge the eighth request submitted by the defendant and an exception to the modification thereof, and exception specially to the charging the jury in substance in that connection that you can find the defendant guilty if the defendant received less than the published rate.

An exception to the refusal of the Court to charge the following part of the ninth request, to wit: "If the jury find as a fact that there

is no evidence one way or the other on that question, then the defendant must be acquitted."

An exception to the refusal of the Court to charge the tenth request.

An exception to the refusal of the Court to charge the eleventh request.

An exception to the refusal of the Court to charge the twelfth request.

An exception to the refusal of the Court to charge the thirteenth request.

An exception to the refusal of the Court to charge the fourteenth request.

An exception to the refusal of the Court to charge the fifteenth request.

An exception to the refusal of the Court to charge the sixteenth request and an exception to the modification thereof.

An exception to the refusal of the Court to charge the seventeenth request.

An exception to the refusal of the Court to charge the eighteenth request.

An exception to the refusal of the Court to charge the nineteenth request and to its modification thereof, and also to the language of the Court in that connection to the effect that it was for the jury to say whether or not there was any evidence that sugars were carried for other shippers on terms different from those mentioned in the indictment.

An exception to the refusal of the Court to charge the twentieth request and an exception to the modification thereof, and an exception to the Court's charging the jury in that connection that the question of ratification is a question for the jury.

An exception to the refusal of the Court to charge the twenty-first request.

An exception to the refusal of the Court to charge the twenty-fourth request.

An exception to the refusal to charge the twenty-sixth request.

An exception to the refusal to charge the twenty-seventh request.

An exception to the refusal to charge the twenty-ninth request, an exception to the modification thereof and an exception to the charge of the Court in that connection in substance that there is no legal presumption one way or the other on the proposition referred to in the request.

An exception to the refusal to charge the 30th request.

An exception to the refusal to charge the 32nd request.

An exception to the refusal of the Court to charge the 34th request.

An exception to the refusal to charge the 37th request.

An exception to the refusal to charge the 38th request.

An exception to the refusal to charge the 39th request and to the modification of the Court thereof, and to the charge of the Court in substance that that is a question for the jury.

An exception to the refusal of the Court to charge the 42nd request.

Exception to the refusal of the Court to charge the 45th request.

The jury retired, and subsequently returned to the court room.

The court thereupon charged the jury further as follows:

Gentlemen, I have received this paper from the Foreman of the Jury: "Does the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law."

To that I reply that it does provided the payment was made with a criminal intent. That criminal intent does not mean with
87 any wicked intent. The payment of rebates is not morally a crime. It was made a misdemeanor by statutes and if a corporation or officer of a corporation pays a rebate with an intent thereby to make the payment in violation of the provisions of the statute prohibiting it, he does it with a criminal intent.

There are three provisions in this Act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

Under another provision of this Act if you find that this defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate, concession or discrimination upon the property transported in this case, "whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule," you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law. You will retire gentlemen.

Mr. LINDSAY: I would like to call Your Honor's attention to the fact that you instructed the jury they might find the defendant guilty if they "offered." There is no charge in this indictment of offering.

88 The COURT: I did not say offer, I think.

Mr. LINDSAY: Your Honor used the word offer.

The COURT: I withdraw that expression if I used it. I did not intend to use it.

Mr. LINDSAY: I also ask Your Honor in this connection to charge as this indictment is framed under the Elkins Law they cannot convict the defendant upon this indictment for anything which transpired before the going into effect of the Elkins Act.

The COURT: Undoubtedly the payment of the rebate must have taken place after the passage of that Act. The fact that the property was transported before the passage of the Act does not bar a conviction in this case.

Before the jury again retired and in their presence the defendant took the following exceptions to the further charge of the Court:

An exception to that portion of the instruction given to the jury in answer to the question presented by the Foreman in which the Court charged the jury in substance that the payment of the rebate after the passage of the Elkins Law on shipments made prior to its passage constituted an offense under the law.

An exception to that portion of the charge in which the Court said in substance that the guilty intent does not necessarily involve a wicked intent.

An exception to that portion of the further instruction in which the Court charged the jury in substance that the jury might find the defendant guilty upon either of the three following theories, namely: First if they find from the evidence that Guilford and Pomeroy were guilty of charging, demanding, collecting or receiving from the American Sugar Refining Company a less compen-
89 sation than that set forth in the scheduled rate. Second if they find that the defendant had been guilty of a wilful failure to strictly observe the tariff rate, or third, if they found that the corporation had offered, granted or given any rebate, concession or discrimination on property transported whereby any such property had been transported at less than the published tariff rate, provided in each case they found that the act was done with criminal intent.

An exception to the instruction given to the jury beyond the mere answering of the question propounded by it.

The jury again retired and later returned into court and rendered a verdict of guilty.

The defendant thereupon moved that the Court set aside the verdict and grant it a new trial upon each of the following grounds:

1. The Court erred in denying this defendant's motion to quash the indictment; to which denial this defendant duly excepted.

2. The Court erred in denying this defendant's motion that the United States Attorney be required to inform the defendant whether the indictment was intended to charge the giving of unlawful rebates in violation of the Elkins Act, or to charge a wilful failure strictly to observe the published tariff rates in violation of that Act; to which denial this defendant excepted.

3. The Court erred in refusing to inform the defendant as to its view of the nature of the crime charged in the indictment; to which refusal this defendant excepted.

4. The Court erred in denying this defendant's motion
90 made at the close of the evidence, that the jury be directed to acquit this defendant for the reasons set forth and stated at length in the said last mentioned motion; to which denial this defendant duly excepted.

5. The Court misdirected the jury in divers matters of law; to each of which misdirections this defendant duly excepted.

6. The Court erred in refusing to charge such of this defendant's requests to charge as it refused to charge in the form in which the same were requested, in its modifications of such of the said requests as were modified by the Court, and in charging the same as so modi-

fied, instead of in the form in which the same were presented; to each of which refusals, modifications and instructions, as so modified, this defendant duly excepted.

7. The verdict of the jury is contrary to law.

8. The verdict of the jury is contrary to the evidence in the case.

The Court denied the motion and the defendant excepted.

The defendant then moved in arrest of judgment, as appears by the record, and that motion having been denied, the court sentenced the defendant for the offense of which it has been convicted to pay a fine of Eighteen thousand dollars and directed that judgment be entered accordingly.

The Court thereupon granted the defendant a stay of execution in order to enable the defendant to prepare and serve this bill of executions, for which purpose the said October Term 1906 was duly extended.

91 EXHIBITS.

Exhibit 1 consists of that part of the tariff produced by the witness George T. Roberts in reference to the rate from New York City to Cleveland and from Yonkers to Cleveland, from which it appeared that the rate from Yonkers to Cleveland was the same as that from New York City to Cleveland, namely, twenty-one cents, that the New York rate as named in the tariff applied on St. John's Park Station, Pier 4 East River; Barclay Street Station; 33rd Street Station; 60th Street Station North River; from sugar refineries; from Palmer's Dock Foot of North Sixth Street Brooklyn, E. D.; from the foot of Bridge Street, Brooklyn and from forwarding stations of Brooklyn Wharf & Warehouse Company, Brooklyn; from Long Island City, N. Y., where coming from points beyond on Long Island Railroad; from Warren Street, Jersey City; also from Stations on the Hudson Division of the New York Central and Hudson River road and that New York did not include Yonkers.

EXHIBIT 2.

Red Line.

Initial Road.
N. Y. C. From 60 St. State of N. Y. July 24, 1902. Series: C. L. Way-Bill No. 225. Line pro. No. 313. Car Number 42918. Initial L. S. Route: Via Junction E. B., with L. S. Weigh this car at Pal. Docks. Consignor: A. S. R. Co. Consignee: Am. Sugar Ref. Co. Destination: Cleveland, O. Articles and classification: 100 b'r'l sugar. Weight: 34802; 1600—36402. Rate and Authority: 21. Freight: 76.44. Prepaid: 76.44. Paid to Cleveland. Merwin St. Warehouse. Pd. Cleveland. #1986 (428). Correct copy. D. L. Collin, Ag't.

EXHIBIT 3.

Office of
Lowell M. Palmer,
184 Front Street,

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Aug. 20 1902
Office of Ass't Traffic Manager.

92

NEW YORK, *August* 19, 1902.

Dictated by T. P. R.
Personal.

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I enclose herewith our claim No. 30240, amounting to $2351.33, for overcharge in rate on the all-rail sugar forwarded to Cleveland, in accordance with our agreement.

Won't you be kind enough to have this matter handled promptly, and check for the claim, drawn to the order of Lowell M. Palmer, sent to me at your earliest convenience.

Yours very truly,

Enc.

LOWELL M. PALMER,
Per L.

EXHIBIT 4.

Office of
Lowell M. Palmer,
184 Front Street,

(Stamp)
N. Y. C. & H. R. R.
W. S. R. R.
Sep. 17 1902
Office of Ass't Traffic Manager.

NEW YORK, *Sept.* 16, 1902.

Personal.

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York.

93 DEAR SIR: I beg to enclose herewith our claim 30562, amounting to $11982.86, for overcharge on Cleveland sugar during the month of August. Kindly put same in the hands of the proper parties for prompt checking and payment, and thereby oblige,

Yours very truly,
(S'd)

LOWELL M. PALMER,
R.

Encl.

EXHIBIT 5.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Oct. 20, 1902,
Office of Ass't Traffic Manager.

Office of
Lowell M. Palmer,
184 Front Street.

NEW YORK, *Oct.* 14, 1902.

Personal:

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R, New York City.

DEAR SIR: I enclose herewith our claim No. 30975, amounting to $11,721.50, for overcharge on Cleveland sugar forwarded via Red Line during the month of September.

Won't you kindly arrange to have this claim put in line for prompt adjustment, and also see if settlement of the July and August claims cannot be hurried.

Yours very truly,

LOWELL M. PALMER,
R.

Enc.

EXHIBIT 6.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Nov. 19, 1902,
Office of Ass't Traffic Manager.

Office of
Lowell M. Palmer,
184 Front Street.

94

NEW YORK, *Nov.* 18, 1902.

Personal:

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I enclose herewith our claim No. 31530, amounting to $5881.13 for overcharge on shipments of sugar forwarded to Cleveland via the Red Line in October, which kindly put in line for adjustment.

Yours very truly,

LOWELL M. PALMER,
R.

Enc.

EXHIBIT 7.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Jan. 16, 1903,
Office of Ass't Manager.

Office of
Lowell M. Palmer,
184 Front Street.

NEW YORK, *Jan.* 13, 1903.

Personal.

r. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I beg to return herewith our claims for overcharge on e Cleveland all-rail sugar, amended to conform to the basis named Mr. Guilford's letter of Nov. 20, 1902. The claims, as they now nd, are as follows, and I should be very much obliged if you could e your way clear to have them vouchered and settled at an early te:

Our No.	30240	$2,254.18
Our No.	30562	$11,201.08
"	30975	10,707.81
"	31530	5,608.29
"	31874	9,672.94

Yours very truly,

LOWELL M. PALMER,
R.

Enc.

Exhibit 8 for identification was not offered in evidence.

EXHIBIT 9.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Mar. 19, 1903,
Office of Ass't Manager.

Office of
owell M. Palmer,
184 Front Street.

NEW YORK, *March* 18, 1903.

ersonal.

F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York ity.

EAR SIR: The claims rendered on last year's shipments of all-rail r to Cleveland by the Red Line amount to $31,936.82. Up to present writing, none of these claims has been paid, and if there ything you can do, looking towards their early adjustment, I

shall be much obliged. I would like to get them out of the way with as little further delay as possible.

Yours very truly,

LOWELL M. PALMER,
R.

Exhibit 10 for identification was not offered in evidence.

96 EXHIBIT 11.

Dated Office of Lowell M. Palmer, 184 Front St., New York City.

Personal.

Nov. 18TH, 1902.

Mr. Nathan Guilford, Traffic Manager, N. Y. C. & H. R. R. R., New York City.

DEAR SIR: Referring to the matter of the Cleveland all-rail sugar: In the first place let me call your attention to the memo made July 24th, 1902, in Mr. Pomeroy's office covering the arrangement:

"Sugar Shipments to Cleveland and Beyond.

1st. Shipments to be billed from New York at the regular tariff rate of 21 cents per 100 lbs.

2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements of 4 1/5 cents per 100 pounds.

3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under this arrangement to the American Sugar Refining Co., Merwin Street, Cleveland.

4th. The New York Central to make reclamation against L. M. Palmer for refund of one and one-fifth cents per 100 pounds, account of lighterage allowed him in regular billing. This amount to be handed by Mr. L. M. Palmer to the New York Central in cash.

5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central, for overcharge on such shipments of sugar to Cleveland as are covered by the first clause in this memorandum, on the basis of 6 cents per 100 pounds.

6th. This arrangement to apply to all sugar billed to Merwin Street warehouse, whether delivered locally in Cleveland or reconsigned beyond Cleveland.

The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return, for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds."

When the deal was consummated it was with the understanding that the all-rail sugar forwarded to Cleveland by the Red Line was to be used for delivering locally in Cleveland, or for reconsignment beyond, in precisely the same manner that the sugar forwarded by

canal had been used previously. Our arrangement with Mr.
97 Cost of the Big Four road, for the handling of the canal sugar was as follows: The Big Four road gave us the exclusive use of what is known as the Merwin Street warehouse in Cleveland, free of charge and all of the sugar stored in that warehouse, that was reconsigned beyond Cleveland, went forward by the Big Four to all points that they could reach; was delivered locally in Cleveland, or was sent forward from there by roads other than the Big Four to points which they could not handle, on proportional rates that were arranged with the other roads, based on the same figures we had in effect with the Big Four to adjacent points; the Big Four giving us precisely the same facilities and accommodations on sugar which they did not handle over their own roads from Cleveland, as on the sugar which they did carry; and, as stated above, it was of course understood that the same arrangement would apply on the all-rail shipments consigned to the Merwin Street warehouse. The first intimation that we had that there was anything wrong in our understanding of this arrangement was when Mr. Mitchell of the Michigan Central road called attention to the fact that some of this Merwin Street Sugar was being reconsigned over the Lake Shore road to Berdan & Co., Toledo. When this occurred, we discontinued filling any more of Berdan & Company's orders from the Cleveland stock, and since that time all of Berdan & Co.'s sugar has gone direct from New York all-rail, either by the Blue Line or the North Shore Despatch.

I think the above is a correct outline of what the arrangement was intended to cover. If it is your desire that we eliminate from the claims already rendered against the Red Line the sugar which was actually reconsigned from Cleveland to Berdan & Co., Toledo, please have Mr. Pomeroy return to us the three claims which have been presented to him, and we will have Berdan & Company's shipments cut out of them entirely.

Yours very truly,

(Signed) LOWELL M. PALMER.

EXHIBIT 12.

Memorandum Made July 24th, 1902.

Present: Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.

Sugar Shipments to Cleveland and Beyond.

1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.

2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4 1/5 cents per 100 pounds.

3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.

4th. The New York Central to make reclamation against Mr. L.

M. Palmer for refund of 1 1/5 cents per 100 pounds, account
98 lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.

5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause in this memorandum on the basis of 6 cents per 100 pounds.

6th. This arrangement to apply to all sugar billed to Merwin Street warehouse whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds.

EXHIBIT 13.

The New York Central and Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of the New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Company at a meeting held at Grand Central Depot in the City of New York, on September 28th, 1887:

Resolved: That Mr. Nathan Guilford be appointed General Traffic Manager of this Company to take effect October 1, 1887.

D. W. PARDEE,
Secretary.

EXHIBIT 14.

The New York Central and Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of the New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Com-
99 pany at a meeting held at Grand Central Depot, in the City of New York, on May 11th, 1898:

Mr. Nathan Guilford, General Freight Traffic Manager, will have general supervision of all freight traffic, and Mr. George H. Daniels, General Passenger Agent, of all passenger traffic, reporting direct to the President.

D. W. PARDEE,
Secretary.

EXHIBIT 15.

The New York Central & Hudson River Railroad Company.

I, Dwight W. Pardee, Secretary of The New York Central and Hudson River Railroad Company, hereby certify the following to be a correct transcript from the minutes of the proceedings of the Executive Committee of the Board of Directors of said Company at a meeting held at Grand Central Depot, in the City of New York, on February 1st, 1905:

The President explained the desirability of placing traffic matters in charge of a Vice-President; and, on his motion, Mr. Nathan Guilford was appointed Vice-President, in charge of such matters.

D. W. PARDEE,
Secretary.

EXHIBIT 16.

The New York Central & Hudson River Railroad Company.

NEW YORK, *February* 1, 1901.

Mr. F. L. Pomeroy has been appointed Assistant Traffic Manager of this Company, effective this date.

His office will be at Grand Central Station, New York City.

NATHAN GUILFORD,
Traffic Manager.

100 EXHIBIT 17.

New York Central and Hudson River Railroad.

Leased and Proprietary Lines.

General Notice.

NEW YORK, *June 30th,* 1904.

The following appointments and changes in organization of the Freight Department will take effect July 1st, 1904:

Fred L. Pomeroy, Freight Traffic Manager.

Francis La Bau, Assistant Freight Traffic Manager.

Herbert D. Carter, General Freight Agent, West Shore R. R.

William S. Kallman, 1st Ass't G. F. A., N. Y. C. & W. S. R. R's.

Ira H. Hubbel, 2nd Ass't G. F. A., N. Y. C. & W. S. R. R's.

H. W. Henry, Ass't General Coal Agent.

William A. Newman, Travelling Freight Agent, Hudson, Harlem & Putnam Division.

Offices at Grand Central Station, New York City.

The office of Chief of Tariff Bureau is abolished, and that Bureau will be in charge of the First Assistant General Freight Agent.

The office of Division Freight Agent of the Hudson, Harlem & Putnam Division is also abolished.

NATHAN GUILFORD,
Traffic Manager.

EXHIBIT 18.

New York Central & Hudson River Railroad Company. West Shore Railroad.

Nathan Guilford, Traffic Manager.

NEW YORK, *Nov.* 20, 1902.

L. M. Palmer, Esq., 184 Front Street, City.

DEAR SIR: Replying to your Personal letter of November
101 18th.

According to my memorandum regarding Cleveland sugar, which was made at the time of our conversation, July 18th, it applied only to shipments reforwarded over the Big Four road, and, according to my recollection, the matter of sugar delivered locally at Cleveland or forwarded from Cleveland over roads other than the Big Four was not discussed or mentioned.

On July 24th, in my absence you and Mr. Riley had a conference with Mr. Pomeroy, which developed that you regarded Cleveland city sugar as included in the arrangement; and it was then agreed with Mr. Pomeroy that it might be so included, the rate, however, to be 2 cents per 100 lbs., then on shipments forwarded via the Big Four, subject to my approval, which I hereby give, and settlement of the city shipments may be made on that basis.

With regard to shipments forwarded from Cleveland via other roads than the Big Four, as, for instance, shipments to points on the Lake Shore road, I think you will admit that no reference whatever was made to such shipments in our original arrangements, and we are not willing that it should be so included; and I have, therefore, to ask that you cut out such shipments from your statement, which should cover only shipments reforwarded from Cleveland over the Big Four road, and the city deliveries at 2 cents higher rate.

Trusting that this arrangement will be regarded by you as satisfactory under the circumstances, I am,

Yours truly,

(Signed) N. GUILFORD,
Traffic Manager.

EXHIBIT 19.

Bank of Buffalo. No. 295,647.

$26,141.81 BUFFALO, N. Y., *March* 26, 1903.

Chemical National Bank, New York City.

Pay to the order of Lowell M. Palmer, Twenty-six thousand, one hundred forty-one and 81/100 Dollars.

J. L. DANIELS, *Cashier.*

Endorsed: Pay to the order of the Market & Fulton National Bank, Lowell M. Palmer, Market and Fulton National Bank—Receiving Teller. Received payment March 28, 1903 through New York Clearing House.

102

EXHIBIT 20.

Office of
Lowell M. Palmer
184 Front Street.

(Stamp)
N. Y. C. & H. R. R. R.
W. S. R. R.
Mar. 24, 1903.

OFFICE OF ASS'T TRAFFIC MANAGER,
NEW YORK, *March* 23, 1903.

Mr. F. L. Pomeroy, A. T. M., N. Y. C. & H. R. R. R., New York City.

DEAR SIR: I am exceedingly obliged for your personal favor of the 21st inst., and am very glad to note that we may expect payment of the Cleveland sugar claims by the 15th of April.

Our Wall street people keep after me about this matter, and I shall appreciate anything you can do personally looking towards the adjustment of the matter by the date mentioned.

Yours very truly, LOWELL M. PALMER,
R.

EXHIBIT 22.

MARCH 21*st*, 1903.

Mr. L. M. Palmer, #184 Front St., New York, N. Y.

DEAR SIR: Your personal note of the 16th in regard to claims on sugar to Cleveland:

These claims are in the hands of Mr. Wilson who advises me that most of them will go through this month's account and that he ought to be able to pay them by the 15th of April and possibly be-
103 fore. This will be governed by the state of his finances which is controlled by the roads in the lines.

He will do everything he can to hurry payment and I will watch the matter myself.

Yours truly, F. L. POMEROY,
Assistant Traffic Manager.

EXHIBIT 21.

(P.) Nov. 24TH, 1902.

Personal.

Mr. L. M. Palmer, #184 Front St., New York City.

DEAR SIR: I return herewith your claims as follows covering shipments of sugar to Cleveland, O.:

Your claim 30240 covering shipments in July amounting to $2351.33.

Your claim 30562 covering shipments in August amounting to $11982.86.

Your Claim 30975 covering shipments in September amounting to $11721.50.

Your claim 31530 amounting to $5881.13 covering shipments in October.

I note that all of these claims simply show shipments consigned to Cleveland, and I would therefore be glad if you would have these claims corrected so as to be in accordance with your letter to Mr. Guilford of November 18th and his reply of the 20th. Will you kindly do this and return papers to me, when I will make
104 necessary arrangements for settlement of claims.

Yours truly, F. L. POMEROY,
Asst. Traffic Manager.

The foregoing case contains all the evidence given upon the trial.

And for as much as the matters hereinabove set forth do not fully appear of record, and to the end that the same may be and become of record, and in furtherance of justice and that right may be done, the defendant presents and tenders this his bill of exceptions herein, and prays that the same may be settled, allowed, signed and certified by the Judge who presided at the trial of this cause, as provided by law; and it is done accordingly at the said October Term this 25th day of March, 1907.

GEO. C. HOLT,
District Judge of the United States for the Southern District of New York.

No objection is made to the form of the foregoing proposed bill of exceptions, and notice of the settlement thereof is hereby waived.

Dated, March 25th, 1907.

HENRY L. STIMSON,
United States Attorney.

105 (Endorsed:) U. S. Circuit Sourt, Southern District of New York.—United States *vs.* The New York Central & Hudson River Railroad Company.—Bill of Exceptions.—Albert H. Harris, Attorney for Defendant, 417 Grand Central Station, Borough of Manhattan, New York City.—U. S. Circuit Court, Southern District New York, Filed Mar. 25, 1907, John A. Shields, Clerk.

106 **Circuit Court of the United States, Southern District of New York.**

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Indictment for Unlawfully Granting Rebates in Violation of the Act to Regulate Commerce. 1 Supp., 525, 687, & 32 Stat. 23, 26. Filed March 24, 1906.

Motion in Arrest of Judgment.

And now after verdict and before sentence comes the defendant and moves the court to arrest judgment herein, and not pronounce the same because of manifest errors in the record appearing, to wit:

(1) The Act of February 19, 1903, known as the Elkins Law, on which the indictment is based, was enacted in excess of the power to regulate commerce with foreign nations and among the several states and with Indian tribes conferred upon the Congress by section 8 of Article I of the Constitution of the United States, and is unconstitutional and void in that it undertakes to impose and prescribe unreasonable, unequal and unjust regulations of interstate commerce, that is to say, it subjects carriers engaged in interstate commerce by means of the transportation of property from places in one state to places in another state by railway lines or routes, or partly by railway lines or routes and partly by water, to rules, regulations,
107 restrictions, pains, penalties and punishments which are not imposed upon carriers engaged in interstate commerce in competition with such railway, or part railway and part water lines or routes, by means of the transportation of the same kind of property between the same places, by means of water lines or routes.

(2) The said statute is an unreasonable, unjust and unequal regulation of interstate commerce, and is unconstitutional and void in so far as it undertakes to punish this defendant for acts done by its agents while acting within the scope of their employment, which, if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with the defendant corporation by means of an all-water line or route, would be entirely innocent.

(3) The said statute is unconstitutional and void in that it seeks to deprive this defendant corporation of its property without due process of law in violation of Article V of the amendments to the Constitution of the United States, by subjecting it to the payment of a pecuniary fine, for acts committed by its agents within the scope of their employment in which this defendant did not in any manner participate, thus imputing to the said corporation, and punishing it criminally for acts which it did not in fact commit.

(4) The provisions of section 1 of the said statute, that
108 in construing and enforcing its provisions, the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier, upon which provision the validity of this indictment wholly rests, so far as it relates to the defendant corporation, infringes the rights, privileges and immunities of this defendant corporation under Article V of the Amendments to the Constitution of the United States, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, and thus depriving it of property without due process of law; and the said provision is therefore unconstitutional and void.

(5) The Congress is without power, under the Constitution of the United States, to impute to this corporation the commission of a criminal offense and subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

(6) The matters mentioned in the indictment, in the manner and form as the same are therein stated and set forth, are not sufficient in law, and the defendant is not bound by the law of the land to answer the same.

(7) The acts described and set forth in the first count do not constitute a crime under the laws of the United States.

(8) The acts described and set forth in the second count do not constitute a crime under the laws of the United States.

109 (9) The first count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(10) The second count does not apprise the defendant with reasonable certainty of the nature of the accusation therein intended to be made against it.

(11) The first count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(12) The second count is so ambiguous and indefinite as to make it doubtful what is the exact offense intended thereby to be charged.

(13) The first count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(14) The second count does not charge the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

(15) The Elkins Law did not and was not intended by the Congress to apply to the offering, granting or giving of rebates, concessions or discriminations in respect of the transportation of property in interstate or foreign commerce transported prior to the time when the said amendatory statute went into effect; but applied, and was intended to apply, only to the offering, granting or giving of such
110 rebates, concessions or discriminations in respect of the transportation of property transported in such commerce after the said amendatory statute went into effect; and inas-

much as it does not appear from anything alleged in the first count that the sum therein stated to have been paid by the defendant on April 2, 1903, for and on account and by way of a rebate and drawback was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the first count do not constitute any violation of the Elkins Law.

(16) For the same reason set forth in the last preceding paragraph, and inasmuch as it does not appear that the payment therein stated to have been paid by the defendant "as and for an unlawful rebate, concession and discrimination," was paid in respect of the transportation of sugar transported in interstate commerce subsequent to the 19th day of February, 1903, the facts alleged in the second count do not constitute any violation of the Elkins Law.

(17) The failure to allege the time when the shipments of sugar mentioned in the first count were made, or to state whether the same were made before or after the going into effect of the Elkins Law, renders that count invalid since without such specification the defendant is not informed and the court cannot know the state of facts upon which the court will be called to apply the law of the case.

(18) For the same reason the failure to allege the time
111 when the shipment of sugar mentioned in the second count were made, renders that count invalid.

(19) The payment by the defendant on April 2, 1903, of the sum in the first count alleged to have been paid for and on account and by way of a rebate and drawback did not constitute a violation of any statute or law of the United States at that time in force.

(20) The payment by the defendant on April 2, 1903, of the sum in the second count alleged to have been paid as and for an unlawful rebate, concession and discrimination, did not constitute a violation of any statute or law of the United States at that time in force.

(21) The facts set forth in the first count do not constitute a crime, since it is not alleged that the payment therein alleged to have been made by the defendant was made in respect of the transportation by the defendant of the sugars therein mentioned, or of any property, in interstate commerce.

(22) The facts set forth in the second count do not constitute a crime, since it is not alleged that the sum therein alleged to have been offered, granted and given by the defendant as and for an unlawful rebate, concession or discrimination, was offered, granted or given in respect of the transportation of property in interstate commerce, or that it was given in respect of any particular transaction or matter.

(23) The acts alleged in the first count do not constitute
112 any violation of the Elkins Law by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(24) The acts alleged in the second count do not constitute any violation of the Elkins Law by any unlawful failure on the part of

the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute.

(25) The absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set forth in the first count renders that count invalid.

(26) The absence of any allegation that advantage was given or discrimination practiced by reason of the matters set forth in the second count renders that count invalid.

(27) The acts alleged in the first count to have been done after the going into effect of the Elkins Law, constitute no violation of the provisions of that statute.

(28) The acts alleged in the second count to have been done after the going into effect of the Elkins Law constitute no violation of the provisions of that statute.

(29) The acts alleged in the first count do not constitute any violation of the Elkins Law in the offering, granting or
113 giving of a rebate, concession or discrimination within the meaning of that statute.

(30) The acts alleged in the second count do not constitute any violation of the Elkins Law in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

(31) This defendant is incapable of committing any crime by reason of the matters set forth in the first count.

(32) This defendant is incapable of committing any crime by reason of the matters set forth in the second count.

(33) The acts described and set forth in the first count do not constitute a crime in that it is not alleged therein that the sum therein charged to have been paid by way and for and on account of rebate and drawback was paid unlawfully, or with criminal intent, or with the intent thereby to offer, grant or give any rebate, concession or discrimination, or that thereby any rebate, concession or discrimination was offered, granted or given.

(34) The acts described and set forth in the second count do not constitute a crime in that it is not alleged therein that the sum therein charged to have been paid as and for an unlawful rebate, concession and discrimination was paid with criminal intent.

(35) Two distinct and separate offenses are charged in the first count.

(36) Two distinct and separate offenses are charged in
114 the second count.

37. If the second count adequately alleges the offense of granting or giving a rebate in violation of the Elkins Act, and also adequately alleges the offense of wilfully failing strictly to observe the published tariff rates and charges in violation of the same Act, it is bad for duplicity, and no valid judgment can be rendered thereon.

38. If the second count adequately alleges the offense of granting or giving a rebate in violation of the Elkins Act, and also adequately alleges the offense of wilfully failing strictly to observe the pub-

lished tariff rates and charges in violation of the same Act, that count is bad for duplicity, and no valid judgment can be rendered thereon.

39. More than three years have elapsed since the commission of any acts alleged in the indictment for which this defendant can be lawfully subjected to a criminal prosecution under any statute or law of the United States; and during all of said time the defendant has been a citizen, inhabitant and actual resident of this District, and has been at all times within the jurisdiction of the court.

And because no judgment can be lawfully rendered against the defendant on the said record.

Dated, New York, November 22, 1906.

ALBERT H. HARRIS,
Attorney for the Defendant.

115 (Endorsed:) U. S. Circuit Court, Southern District of New York.—United States, Plaintiff, against The New York Central & Hudson River Railroad Company, Defendant.—Motion in Arrest of Judgment.—Albert H. Harris, Attorney for Defendant, 417 Grand Central Station, Borough of Manhattan, New York City.—Due and timely service of a copy of the within Motion is hereby admitted. Dated November 22, 1906. Henry L. Stimson, U. S. Attorney.—U. S. Circuit Court, Southern District New York, Filed Nov. 22, 1906, John A. Shields, Clerk.

116 Circuit Court of the United States, Southern District of New York.

THE UNITED STATES OF AMERICA
against
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Assignment of Errors.

Now comes the above named defendant, the New York Central and Hudson River Railroad Company, by Albert H. Harris, its attorney, and in connection with its petition for a writ of error herein, makes and files the following assignment of errors:

The Court erred:

1. In holding that the Act of the Congress of February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" on which the indictment herein was based was not unconstitutional and void, and was not enacted in excess of the power conferred upon the Congress by the commerce clause of the constitution of the United States.

2. In holding that the said Act by subjecting carriers engaged in interstate commerce by means of railway lines or routes, or partly by railway lines or routes and partly by water, to rules, regulations,

restrictions, pains, penalties and punishments which were
117 not imposed upon carriers engaged in such interstate commerce in competition with such railway, or part railway and part water lines or routes, by means of all-water lines of route, did not undertake to impose and prescribe unequal and unjust regulations of interstate commerce, and was not for that reason unconstitutional and void.

3. In holding that the said Act was not an unreasonable, unjust and unequal regulation of interstate commerce, and was not unconstitutional and void in so far as it undertook to punish this defendant for acts done by its agents, while acting within the scope of their employment, which, if done by other persons acting within the scope of their employment as agents of a corporation engaged in interstate commerce in competition with this defendant by means of an all-water line or route, would not be the subject of prosecution under the Act.

4. In holding that the said Act, by subjecting this defendant to the payment of a pecuniary fine for acts committed by its agents within the scope of their employment, in which this defendant did not in any manner participate, thus imputing to this defendant and making it punishable criminally for acts which it did not in fact commit, does not seek to deprive this defendant of its property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States, and was not for that reason unconstitutional and void.

118 5. In holding that section 1 of the said Act which declares that in construing and enforcing its provisions the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier does not infringe the rights, privileges and immunities of this defendant under the said Fifth Amendment, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, thus depriving it of property without due process of law, and that the said section was not for that reason unconstitutional and void.

6. In holding that the Congress has power under the Constitution of the United States to impute to this defendant the commission of a criminal offense and to subject it to a criminal prosecution and punishment by reason of the matters described and set forth in the indictment.

7. In overruling the demurrer interposed by the defendant to the indictment herein.

8. In denying the defendant's motion to quash the indictment.

9. In holding that the indictment, and the matters therein contained, in manner and form as the same are therein stated and set forth, are sufficient in law, and that the defendant was bound by the law of the land to answer the same.

10. In holding that the acts described and set forth in the
119 first count constitute a crime under the laws of the United States.

11. In holding that the acts described and set forth in the second count constitute a crime under the laws of the United States.

12. In holding that the first count apprises the defendant with reasonable certainty of the nature of the accusation thereby intended to be made against it.

13. In holding that the second count apprises the defendant with reasonable certainty of the nature of the accusation thereby intended to be made against it.

14. In holding that the first count is not so ambiguous and uncertain as to make it doubtful what is the exact offense intended thereby to be charged.

15. In holding that the second count is not so ambiguous and uncertain as to make it doubtful what is the exact offense intended thereby to be charged.

16. In holding that the first count charges the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

17. In holding that the second count charges the time, place, nature and circumstances of the offense thereby sought to be alleged with clearness and certainty.

18. In holding that the Act of February 19, 1903, entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States" applied to the offering, granting or giving of rebates, concessions or discriminations in respect of the transportation of property in interstate or foreign commerce transported
120 prior to the time when the said Act went into effect.

19. In holding that the failure to allege the time when the shipments of sugar mentioned in the first count were made, or to state whether the same were made before or after the going into effect of the said Act of February 19, 1903, did not render that count invalid.

20. In holding that the failure to allege the time when the shipments of sugar mentioned in the second count were made, or to state whether the same were made before or after the going into effect of the said Act, did not render that count invalid.

21. In holding that the payment by the defendant on April 2, 1903, of the sum in the first count alleged to have been paid for and on account and by way of a rebate or draw-back constituted a violation of the said Act.

22. In holding that the payment by the defendant on April 2, 1903, of the sum in the second count alleged to have been paid as and for an unlawful rebate, concession and discrimination, constituted a violation of the said Act.

23. In holding that the facts set forth in the first count constitute a crime, notwithstanding it is not alleged therein that the payment therein charged to have been made by the defendant was made in respect of the transportation of property in interstate commerce.

24. In holding that the facts set forth in the second count constitute a crime, notwithstanding it is not alleged therein that the
121 sum, therein charged to have been offered, granted and given by the defendant as and for an unlawful rebate, concession

or discrimination, was offered, granted or given in respect of the transportation of property in interstate commerce.

25. In holding that the first count alleged a wilful failure on the part of the defendant strictly to observe its published tariff rates within the meaning of the said Act.

26. In holding that the second count alleged a wilful failure on the part of the defendant strictly to observe its published tariff rates within the meaning of the said Act.

27. In holding that the absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set forth in the first count did not render that count invalid.

28. In holding that the absence of any allegation that advantage was given or discrimination was practiced by reason of the matters set forth in the second count did not render that count invalid.

29. In holding that the acts in the first count alleged to have been done after the going into effect of the said Act constituted a violation of the provisions of that statute.

30. In holding that the acts in the second count alleged to have been done after the going into effect of the said Act consti-
122 tuted a violation of the provisions of that statute.

31. In holding that the acts alleged in the first count constitute a violation of the said Act in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

32. In holding that the acts alleged in the second count constitute a violation of the said Act in the offering, granting or giving of a rebate, concession or discrimination within the meaning of that statute.

33. In holding that this defendant is capable of committing any crime by reason of the matters set forth in the first count.

34. In holding that this defendant is capable of committing any crime by reason of the matters set forth in the second count.

35. In holding that the prosecution was not barred, notwithstanding that at the time of the finding of the indictment more than three years had elapsed since the commission of any acts therein alleged for which this defendant could be subjected to any criminal prosecution, during all of which time the defendant had been a citizen, inhabitant and actual resident of the Southern District of New York and had been at all times within the jurisdiction of this court.

36. In denying the defendant's motion made after the opening of the case for the Government and before the introduction of
123 any evidence, that the United States attorney be required to inform the defendant whether it was charged in the indictment with the giving of rebates under the Act of February 19, 1903, or with having wilfully failed strictly to observe the tariff rate under that Act, or whether the indictment charged the defendant with a violation of the Act of February 19, 1903, or of the Act to regulate commerce, which the Act of February 19, 1903, amended and to a certain extent superseded.

37. In denying the defendant's motion (made upon the denial of the said last mentioned motion) that the court inform the defend-

ant what its view was as to the nature of the crime charged in the indictment.

38. In overruling the defendant's objection to the following question propounded to the witness George T. Roberts: Q. "What was the tariff from Yonkers to Cleveland over the New York Central and Hudson River Railroad Company and the Lake Shore and Michigan Southern on sugar in carload lots, in barrels or bags, during the year 1902?" and in permitting the witness to testify, over the defendant's objection, in answer to the said question, in substance that the tariff from Yonkers to Cleveland over the said roads, on sugar in car-load lots, in barrels or bags, during the year 1902 was twenty-one cents for each one hundred pounds.

39. In denying the defendant's motion that the jury be directed to acquit the defendant, in that

(*a*) it appeared by the evidence that the transportation of all of the goods mentioned in the indictment or as to which any evidence had been adduced was begun and completed before the pas-
124 sage of the Act of February 19, 1903;

(*b*) that there was no evidence in the case showing or tending to show that at any time after the going into effect of the said Act there was any wilful failure on the part of the defendant strictly to observe the published tariff rate in respect to the transportation of any property which was transpored after the going into effect of the said Act;

(*c*) that there was no evidence in the case showing or tending to show that at any time after the passage of the said Act the defendant was guilty of any violation thereof in respect to the payment or giving or offering of any rebate made punishable under its provisions;

(*d*) that there was no evidence in the case showing or tending to show the commission by the defendant within the Southern District of New York or within the jurisdiction of this court of any violation of the Act;

(*e*) that the indictment charged no violation by the defendant of the Act or of any other statute of the United States.

40. In charging the jury as follows:

"The original Interstate Commerce Act provided that every common carrier carrying on commerce between the states, either alone or by a joint traffic arrangement with connecting roads, should print and keep open for public inspection, schedules showing the rates of fares and charges for transportation of passengers and property which any such common carrier has established and which are in force at the time. There are various provisions in detail contained in the Act with reference to these schedules. They are to be filed in the office of the Commission of Interstate Commerce and posted in the stations of the roads, and deviations from these
125 scheduled rates are declared to be illegal. When any such common carrier shall have established and published these rates, fares and charges in compliance with the provisions of this section the Act provides that 'it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or

persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the commission in force at the time.'"

41. Again in charging the jury as follows:

"Of course in the case of the defendant in this case, if a passenger agent or a person having nothing to do with the traffic department of the business should make a contract for rebates on the carriage of freight, the corporation would not be bound by it; but if the contract is made by an officer or agent of the company acting within the scope of his employment, the corporation is bound."

42. Again in charging the jury as follows:

"Of course there may be legitimate overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause. That is the simple question in this case for you to determine and that question I leave for you to pass upon upon the consideration of all the evidence in the case."

43. In refusing to charge the jury as follows:

"That upon all the evidence it is the duty of the jury to render a verdict of not guilty."

44. In refusing to charge the jury as follows:

"That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant
126 was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors or any officer beyond the agent who gave the rebate, then the defendant should be acquitted."

45. In refusing to charge the jury as follows:

"That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation."

46. In refusing to charge the jury as follows:

"That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except said agent, then the defendant must be acquitted."

47. In refusing to charge the jury as follows:

"That the burden of proof is not upon the defendant to show affirmatively that no advantage was given in favor of or a dis-

crimination practiced against any shipper or consignee other than those named in the indictment, but the burden of proof is upon the Government to show that fact, if it be true."

48. In refusing to charge the jury as follows:

"That the jury must not speculate or guess on the question whether any advantage was given to or discrimination practiced against any shipper or consignee other than those named in the indictment, and if the jury find as a fact that there is no evidence one way or the other on that question, then the defendant must be acquitted."

49. In refusing to charge the jury as follows:

"That the Government having failed to prove that any advantage was given to anyone mentioned in the indictment, or that discrimination was practiced in favor of or against any other shipper or consignee by reason of the giving of the alleged rebate, the defendant must be acquitted."

127 50. In refusing to charge the jury as follows:

"That before the jury can find this defendant guity of giving an unlawful rebate, they must find as a fact from the evidence and find beyond a reasonable doubt, that in the giving of the alleged rebate the defendant did thereby give some advantage to or practiced some discrimination in favor of or against some other shipper or consignee than the one mentioned in this indictment."

51. In refusing to charge the jury as follows:

"That the element of advantage or discrimination is an essential element of the crime of giving a rebate and as the indictment omits to allege this element it fails to charge a crime and the defendant must be acquitted."

52. In refusing to charge the jury as follows:

"That even if the jury find a criminal intent in an agent or agents of the defendant, the jury cannot impute that intent to the defendant."

53. In refusing to charge the jury as follows:

"That the jury cannot make a finding of criminal intent against the defendant and base that finding solely on a finding of criminal intent in an agent or agents of the defendant."

54. In refusing to charge the jury as follows:

"That the defendant can in no event be convicted of a criminal intent to commit the crime of giving a rebate."

55. In refusing to charge the jury as follows:

"That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity or by direction of those controlling its corporate action it gave or authorized the giving of the rebate charged in the indictment."

56. In refusing to charge the jury as follows:

"That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted."

128 57. In refusing to charge the jury as follows:

"That the defendant cannot be found guilty unless the evidence shows that sugar was carried for other shippers over the route named in the indictment on terms different from those given to the shippers named in the indictment."

58. In refusing to charge the jury as follows:

"That there is no evidence that sugars were carried for other shippers over the route between New York and Cleveland named in the indictment on terms different from those on which the sugars mentioned in the indictment were carried."

59. In refusing to charge the jury as follows:

"That the jury cannot find the defendant guilty upon a finding that the defendant after the fact, ratified or approved of the giving of alleged rebate."

60. In refusing to charge the jury as follows:

"That even if the jury find as a fact that an agent or agents of the defendant gave a rebate as alleged in the indictment, and that thereafter such rebate was paid by or through other agents of the defendant corporation in Buffalo, still these facts are not of themselves sufficient to warrant a verdict of guilty against the defendant."

61. In refusing to charge the jury as follows:

"That there is no evidence that those who controlled the corporate action of the defendant authorized or knew of the giving of the rebate alleged in the indictment."

62. In refusing to charge the jury as follows:

"The provisions of the Elkin's Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury."

63. In refusing to charge the jury as follows:

"That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy and that
129 as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation, then the defendant must be acquitted."

64. In refusing to charge the jury as follows:

"That in order to find that an agent or agents of the defendant was or were acting within the scope of his or their employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent or agents had authority to establish lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment."

65. In refusing to charge the jury as follows:

"The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment."

66. In refusing to charge the jury as follows:

"The presumption is that the defendant gave no direction or authority to any of its agents to commit an offense against the United States."

67. In refusing to charge the jury as follows:

"The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States."

68. In refusing to charge the jury as follows:

"That in order to find the defendant guilty, the jury must find that the evidence shows beyond a reasonable doubt that the defendant itself was guilty of a criminal intent separate and distinct from any criminal intent of any agent or agents of defendant whom the jury may find gave the rebate charged in the indictment."

69. In refusing to charge the jury as follows:

"That even if the jury find that some agent or agents of the defendant gave the rebate charged in the indictment and acted with criminal intent in so doing, yet the jury must not impute such criminal intent to the corporation merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant."

130 70. In refusing to charge the jury as follows:

"Even if the defendant can be guilty of a criminal intent, the jury cannot base a finding of such criminal intent solely on a finding of criminal intent on the part of Fred L. Pomeroy."

71. In refusing to charge the jury as follows:

"The defendant cannot be convicted of a wilful failure strictly to observe the published tariff rates by reason of anything done or omitted by it, or its agents, after the transportation of property was completed."

72. In refusing to charge the jury as follows:

"The alleged payment on April 2nd, 1903, did not constitute a failure on its part strictly to observe its published rate."

73. In refusing to charge the jury as follows:

"That if the jury are unable to determine whether either Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent, then the jury must find a verdict of not guilty."

74. In refusing to charge the jury as follows:

"That if the jury find as a fact that the language of the Elkins Act is confusing, so far as it applies to the matters charged in the indictment, they may take that fact into consideration in determining the guilt or innocence of the defendant."

75. In further charging the jury in response to its question: "Does the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law?" as follows:

"To that I reply that it does, provided the payment was made with criminal intent."

76. In further charging the jury in response to the said question:

"That criminal intent does not mean with any wicked intent. The payment of rebates is not morally a crime. It was made
131 a misdemeanor by statutes, and if a corporation or officer of a corporation pays a rebate with an intent thereby to make

the payment in violation of the provisions of the statute prohibiting it, he does it with a criminal intent."

77. In further charging the jury in response to said question as follows:

"There are three provisions in this Act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

Under another provision of this Act if you find that this defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate, concession or discrimination upon the property transported in this case, 'whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule,' you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law."

78. In denying the defendant's motion to set aside the verdict and for a new trial.

79. In denying the defendant's motion in arrest of judgment.

80. In entering judgment upon the verdict of the jury.

Wherefore the defendant prays that the judgment herein be reversed, annulled and held for naught, and that the defend-
132 ant be wholly discharged and dismissed from the premises in the indictment specified.

Dated, New York, March 30th, 1907.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By ALBERT H. HARRIS, *Attorney.*

Read the 30th day of March, 1907.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) Circuit Court of the United States, Southern District of New York.—The United States of America, *vs.* The New York Central and Hudson River Railroad Company.—Assignment of Errors.—Albert H. Harris, Attorney for Defendant.—U. S. Circuit Court, Southern District New York, Filed Mar. 30, 1907, John A. Shields, Clerk.

133 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff-in-Error,
against
THE UNITED STATES OF AMERICA, Defendant-in-Error.

Supersedeas Bond.

Know all men by these presents, that we, The New York Central and Hudson River Railroad Company, a corporation organized and existing under the laws of the State of New York, as principal, and National Surety Company, a New York corporation, as Surety, are held and firmly bound unto The United States of America in the sum of Eighteen Thousand Dollars to be paid to the said United States, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29th day of March, in the year of our Lord, One Thousand Nine Hundred and Seven.

Whereas, on the 22nd day of November, 1906, in a cause pending in this court between the United States of America and the said New York Central and Hudson River Railroad Company a judgment and sentence were rendered against the said The New York Central and Hudson River Railroad Company, and

Whereas, the said The New York Central and Hudson River Railroad Company has prayed and been al-owed a writ of error from the Supreme Court of the United States to this court to re-
134 verse the said judgment and sentence;

Now, the condition of this obligation is such that if the said The New York Central and Hudson River Railroad Company shall prosecute the said writ of error to effect an- answer all damages and costs if it fail to make its plea good, and shall appear in the said Supreme Court on the 27 day of April 1907, and from day to day thereafter until the said cause shall be finally disposed of, and shall abide by and obey the judgment and order made by the said Supreme Court in said cause, and shall pay the said judgment against it, if the same shall be affirmed and if it shall appear for trial in this court on such day as may be appointed for a retrial and abide by and obey all orders of this court, provided the said judgment and sentence against it shall be reversed by the said Supreme Court, then this obligation shall be void; otherwise to remain in full force and virtue.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
[SEAL.] By W. A. NEWMAN, *President.*
THE NATIONAL SURETY COMPANY,
[SEAL.] By WM. A. THOMPSON, *Resident Vice-President.*

Attest:
HARRY E. EMMETT,
Resident Assistant Secretary.

Sealed and delivered, and taken and acknowledged, this 29th day of March, 1907, before me,

[SEAL.] E. MORTIMER BOYLE,
Notary Public, New York County.

Approved as to form and sufficiency of surety this 30
135 day of March, 1907.

HENRY L. STIMSON,
United States Attorney.

136 **Financial Exhibit of the National Surety Company of New York as of December 31st, 1906.**

Wm. B. Joyce, President. **Samuel H. Shriver, Secretary.**

Assets.

Bonds:

275,500	United States Government Bonds	$294,115.00	
940,000	New York City Bonds	930,600.00	
10,000	Penna. Railroad Bonds	9,600.00	

Guaranteed Railroad Stocks:

100 Shs.	N. Y. Lack. & W.	(5% Guar. by D. L. & W.)	12,925.00
100 "	Nash. & Decatur	(7½% " " L. & N.)	19,375.00
200 "	Morris & Essex	(7% " " D. L. & W.)	37,100.00
100 "	Pitts. Ft. W. & Chic.	(7% " " Penn. R. R.)	17,775.00
100 "	Cleve. &. Pitts.	(7% " " " ")	17,758.33
100 "	Atl. & Char. Air Line	(7% " " So. Ry.)	18,058.33
100 "	Det. Hillside & S. W.	(4% " " L.S.&Mich. So.)	10,400.00
100 "	Rome, Watert'n & Og.	(5% " " N. Y. Cent.)	12,862.50
100 "	Ill. Cent. Leased Lines	(4% " " Ill. Cent.)	10,400.00
400 "	K. C. Ft. S. & Memph	(4% " " St. L. & San Fr.)	32,000.00

Railroad Stocks:

200 Shares	Union Pac. Preferred	18,500.00
400 Shares	Lehigh Valley.	31,000.00
		1,472,469.16
Real Estate (Unencumbered)		116,426.77
Mortgage Loans (First Liens)		17,465.85
Advanced on Contracts (Secured)		9,553.65
Accounts due from R. R.'s for inspections, not over three months overdue		5,727.61
Outstanding Premiums, not over three months overdue		179,719.15
Accrued Interest on Investments		8,196.15
Cash in Banks and Offices		294,553.67
		$2,104,112.01

Liabilities.

Capital Stock	$500,000.00
Net Surplus	620,565.61
Quarterly Dividend payable Jan'y 2, 1907	10,000.00
Reserve for Claims in process of adjustment, less reinsurance	115,978.01
Legal Premium Reserve	700,097.01
Contingent Reserve	100,000.00
Commission on Unpaid Premiums and Other Liabilities	57,471.38
	$2,104,112.01

STATE OF NEW YORK, *City and County of New York, ss:*

Gilbert Congdon of New York, being duly sworn, deposes and says that he is Assistant Secretary of the National Surety Company, of New York, and that the above and foregoing is a full, true and correct statement of the financial condition of said company on the Thirty-first day of December, A. D., 1906, as the same remains upon file in the office of the Attorney-General of the United States.

GILBERT CONGDON.

Subscribed in my presence and sworn to before me this 28th day of March, A. D., 1907.

[SEAL.] MARGARETTA CROOKE,
Notary Public, No. 35, for Kings County.

Certificate filed in New York, Queens, Richmond and Westchester Counties.

43 WALL STREET,
NEW YORK, *January 23rd,* 1907.

We have examined the books of the National Surety Company, of New York, as of December 31st, 1906, and certify that the foregoing Balance Sheet agrees therewith and, in our opinion, correctly sets forth the condition of the Company's affairs as of that date. We received verification of the Cash in banks and offices; and all Securities covering the Investments and other Assets of the Company were examined by us and found in order.

GUNN, RICHARDS & CO.,
Public Accountants.

137 (Endorsed:) Circuit Court of the U. S., Southern District of New York.—The New York Central and Hudson River R. R. Co. Plaintiff in Error, *vs.* The United States of America, Defendant in Error.—Supersedeas Bond.—Albert H. Harris, Attorney for Plaintiff-in-Error, 417 Grand Central Station, Manhattan, New York City, N. Y.—Approved as to form and also as to sufficiency of sureties, with reservation, however, to the Defendant in Error of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities and financial condition generally. E. Henry Lacombe, U. S. Circuit Judge.—U. S. Circuit Court, Southern District New York, Filed Mar. 30, 1907, John A. Shields, Clerk.

138 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit,

To Henry L. Stimson, Esquire, United States Attorney for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the City of

Washington, in the District of Columbia, on the 27 day of April 1907, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the New York Central and Hudson River Railroad Company is plaintiff and the United States of America is defendant, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 30 day of March, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

139 [Endorsed:] E. & A. C. 2571. United States Supreme Court. The New York Central and Hudson River R. R. Co., Plaintiff-in-error, *vs.* The United States of America, Defendant-in-error. Citation. U. S. Circuit Court. Filed Apr. 1 1907 Southern District, New York. John A. Shields, Clerk. Albert H. Harris, Attorney for plaintiff-in-error, 417 Grand Central Station, Manhattan, New York City, N. Y. A copy of the within paper has been this day received at this office. Apr. 1 1907 Henry L. Stimson U. S. Attorney. 10 M E

140 [Endorsed:] U. S. Supreme Court New York Central and Hudson River R. R. Co. Pl'ff in Error, *vs.* The United States of America Def't in Error.

Endorsed on cover: File No. 20,686. S. New York C. C. U. S. Term No. 294. The New York Central & Hudson River Railroad Company, plaintiff in error, *vs.* The United States. Filed May 1st, 1907. File No. 20,686.

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Supreme Court of the United States,

OCTOBER TERM, 1908.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Plaintiff in Error, vs. THE UNITED STATES.	No. 69.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to review a judgment of the Circuit Court of the United States for the Southern District of New York, rendered November 22, 1906, sentencing the plaintiff in error, a New York corporation, to pay a fine of $18,000 on conviction by the verdict of a jury of an alleged violation of Section 1 of the so-called Elkins Act (Record, pp. 2, 19-20, 49-50).

The indictment, which was one of the four filed May 4, 1906 (see our brief in No. 57, argued herewith, p. 4, *note*), contains two counts (Record, pp. 3-8). It was based upon the payment to the American Sugar Refining Company on April 2, 1903—two months after the passage of the Elkins Act—of an alleged

rebate of $26,141.81 in respect of the transportation prior to the passage of that Act, of various consignments of sugar from New York to Cleveland, Ohio. It is apparent from the form of the language used in the charging part, and in the concluding paragraph of each of the counts, that the pleader was in doubt as to whether or not Section 1 of the Elkins Act operated to repeal the penal provisions of the earlier statute dealing with the same general subject matter, and therefore undertook to employ language which would bring the case within either Act.

The first count sets forth that at the times therein mentioned the plaintiff in error was engaged in the transportation of property, from the City of New York, by way of the Southern District of New York, to the City of Cleveland, Ohio, and beyond, and had filed and published a tariff or schedule of charges, &c., whereby the rate from New York to Cleveland upon sugars was twenty-one cents for each hundred pounds:

> "which . . . was the rate charged, demanded, collected and received by the said New York Central and Hudson River Railroad Company from other persons than 'The American Sugar Refining Company'" (a New Jersey corporation) "for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned" (p. 4).

It then alleges that on November 20, 1902, the officers and agents of the Sugar Company induced the plaintiff in error to enter into an unlawful agreement and arrangement whereby it was agreed that in the event of the Sugar Company shipping a portion of its products from New York to Detroit over the lines and routes aforesaid, and paying the plaintiff in error the full tariff rate of twenty-one cents, the plaintiff in error would allow the Sugar

Company a rebate to be refunded therefrom, of six cents for each hundred pounds of sugar shipped to Cleveland for reconsignment to points beyond that city, and of four cents for each hundred pounds shipped to Cleveland to go no further; that under the agreement the Sugar Company made divers and various consignments over the plaintiff in error's lines; that the lawful tariff rate was duly paid by the Sugar Company according to the agreement, and the sugars actually transported under the agreement over the plaintiff in error's lines to Cleveland and points beyond; that thereafter divers "claims for rebate and drawback for and on account of said sugars, transported as aforesaid" were presented by the Sugar Company to the plaintiff in error for payment, and that on April 2, 1903, the plaintiff in error

> "paid, and caused to be paid, to the said 'The American Sugar Refining Company' by way of rebate and drawback, the sum of twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81) for and on account of and by way of the *rebate and drawback* hereinbefore set forth and agreed to, by and between the said companies, for the reduction of the said tariff schedules as aforesaid, said rebate and drawback being so paid upon the claims aforesaid and in respect to the sugar shipped and transported as aforesaid" (p. 5).

The second count omits the averments of the first regarding the alleged agreement between the plaintiff in error and the Sugar Company. After repeating the formal allegations as to the plaintiff in error's through route to Cleveland, the tariff rate, &c., it sets forth that prior to April 2, 1903, the plaintiff in error accepted from the Sugar Company certain sugars to be transported from New York to Cleveland, and received payment therefor

from the Sugar Company at the regular published tariff rates, and that

> "the said railroad company having so transported the said sugars from the said City of New York, by way of the Southern District of New York, as aforesaid, at and in the said District, and within the jurisdiction of this court, on the second day of April, in the said year, did unlawfully and wilfully offer, grant and give to the said 'The American Sugar Refining Company' the sum of twenty-six thousand one hundred and forty-one dollars and eighty-one cents ($26,141.81) as and for an unlawful *rebate, concession and discrimination*" (p. 7).

The concluding allegation of each count is that the plaintiff in error,

> "in manner and form and by the means aforesaid, in and by the aforesaid payment * * * did unlawfully and wilfully violate the provisions of the said Act to Regulate Commerce and the Acts amendatory thereof, in that the said New York Central & Hudson River Railroad Company then and there did take, receive and collect of and from the said 'The American Sugar Refining Company' in and for the transportation of its said freight and property a less compensation for said services rendered than the said New York Central & Hudson River Railroad Company charged, demanded, collected and received from other persons for doing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions and so was then and there guilty of *unjust and unlawful discrimination;* and did unlawfully offer, grant and give a rebate, concession and discrimination in respect to the aforesaid transportation of said freight and property in interstate commerce" (pp. 5-6, 7-8).

The plaintiff in error interposed a demurrer to the indictment which was both general and special

in form, assigning as objections (*a*) that the acts described did not constitute a crime under the laws of the United State, (*b*) that the indictment did not apprise the defendant with reasonable certainty of the nature of the accusation, and (*c*) that it did not charge the time, place, nature and circumstances of the offense sought to be alleged with clearness and certainty (pp. 8-9).

In overruling the demurrer the court, without passing definitely upon the objection that the indictment was bad for lack of an averment that discrimination or undue advantage resulted from the giving of the alleged rebate, decided that the allegations of the indictment sufficiently supported a charge of violating the provisions of the *Interstate Commerce Act* "prohibiting deviations from the published rate" (p. 11), and that the averment that the alleged payment was "by way of rebate," &c., was "a sufficient allegation that the payment was a wilful failure to observe the published tariff" (p. 12). In the learned Judge's opinion, the indictment was, moreover, sufficiently definite and specific (p. 11).

On the trial the defendant moved, immediately after the jury had been empanelled, that they be directed to render a verdict of acquittal on various grounds, and among others (pp. 20-24):

> 1. That the Elkins Act was unconstitutional and void (*a*) in subjecting "all rail" carriers to rules, regulations, restrictions, pains, penalties and punishments not imposed upon competing "all water" carriers (p. 37 [1] and [2]), in subjecting the defendant to the payment of a pecuniary fine for acts committed by its agents, in which the defendant did not participate (*Id.* [3], [4]), and in imputing to the defendant the commission of a criminal offense and subjecting it to prosecution and punishment by reason of the matters described and set forth in the indictment (*Id.* [5]).

2. That the the indictment was so ambiguous and indefinite as to make it doubtful what was the exact offense intended to be charged (p. 22 [11] and [12]); and

3. That the acts alleged did not constitute any violation of the Elkins Act by any unlawful failure on the part of the defendant strictly to observe its published tariff rates at any time after the going into effect of the said statute (p. 23 [23] and [24]); and that the Act did not, and was not intended by Congress to apply to the offering, granting or giving of rebates, &c., in respect of the transportation of property transported prior to its passage, and that inasmuch as it did not appear from anything alleged in the indictment that the payment therein mentioned was made in respect of sugar transported subsequent to February 19, 1903, the facts alleged did not constitute any violation of the Act (pp. 22-23 [15] to [20], inclusive).

This motion being denied, and the case having been opened by counsel for the Government, the defendant, asserting that the indictment was indefinite and uncertain in that regard, moved that the District Attorney be required to inform it whether it was charged with the giving of rebates under the Elkins Act, or with having wilfully failed strictly to observe the tariff rate under that Act, or with a violation of that Act, or of the Act to Regulate Commerce; and this motion having been denied, the defendant asked the court to inform it what its view was as to the nature of the offense charged, in order that it might proceed intelligently with the trial, and with knowledge of the court's views in that regard. The court refused to give the desired information. Exceptions were duly taken in each instance (p. 24).

From the evidence introduced by the Government, which was uncontradicted, and consisted largely of an agreed statement of facts, it

appears that the transaction upon which the indictment was based was as follows:

At the times mentioned in the indictment the plaintiff in error and the Lake Shore and Michigan Southern Railway Company were operating a continuous fast freight all-rail line or route known as the "Red Line" from the City of New York to Cleveland, Ohio, by way of the Southern District of New York (pp. 25-26). By the joint tariff established, filed with the Interstate Commerce Commission and published by the plaintiff in error, and duly concurred in by the Lake Shore and Michigan Southern Railway Company, the rate for the transportation of sugars from New York to Cleveland by this line was twenty-one cents for each hundred pounds (p. 26).

During the same time, and prior thereto there was an all-water route from New York to Cleveland by which the American Sugar Refining Company, a New Jersey corporation, shipped very largely in 1900 and 1901. In 1902 that Company shipped over 18,000 tons of sugar from New York to Cleveland by water routes (p. 31).

On July 24, 1902, Lowell M. Palmer, one of the directors of the Sugar Company, who routed and arranged the rate for practically all of the Company's shipments, had an interview with Fred L. Pomeroy, the plaintiff in error's Assistant Traffic Manager in the latter's office, on the subject of shipments to a warehouse in Cleveland known as the Merwin Street Warehouse, to which the Sugar Company made large shipments that year (p. 29). Nathan Guilford, the plaintiff in error's General Freight Traffic Manager, with whom Palmer had previously had a conversation on the same subject (p. 58), was then away (p. 31). At this interview —at which Thomas P. Riley, of Palmer's office, was also present—Palmer told Pomeroy that the Cleveland Steel Canal Boat Company with whom he had

made a contract in 1898 or 1899 for shipments of sugar to Cleveland by an all-water route, had failed to keep their agreement, that the boats did not arrive in New York harbor in time to make the shipments in accordance with the sugar company's wants, that there was at times so little sugar in the warehouse that customers could not be supplied, and that this had resulted in a lawsuit against the company; and he asked Pomeroy, in view of the circumstances "to make an all-rail route that would enable the company to continue its business at Cleveland" (pp. 29-30). The interview resulted in an arrangement of which the following memorandum was made at the time:

> "Memorandum made July 24th, 1902. Present: Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.
>
> Sugar Shipments to Cleveland and Beyond.
>
> 1st. Shipments to be billed from New York regular tariff rate 21 cents per 100 pounds.
>
> 2nd. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements 4 1/5 cents per 100 pounds.
>
> 3rd. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned under the arrangement to the American Sugar Refining Company, Merwin Street, Cleveland.
>
> 4th. The New York Central to make reclamation against Mr. L. M. Palmer for refund of 1 1/5 cents per 100 pounds, account lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.
>
> 5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause in this memorandum on the basis of 6 cents per 100 pounds.

> 6th. This arrangement to apply to all sugar billed to Merwin Street Warehouse whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return for submission to him as to his understanding of the arrangement. In any event the difference in the rate between the sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds" (pp. 55-56).

Guilford, as General Freight Traffic Manager charged with the general supervision of all freight traffic matters, and Pomeroy as Assistant Traffic Manager, were authorized to establish rates over the plaintiff in error's lines, and to unite with the Lake Shore and Michigan Southern Railway Company in the establishment, filing and publishing of through rates (pp. 27-28); but, obviously, neither of them had authority to reduce or change the Company's own rates, or unite in the reduction or change of a joint rate, except in the manner prescribed by the Interstate Commerce Act. If, when Palmer explained his reasons for asking for making a lower rate to Cleveland than that set forth in the company's published schedule, they believed that the company's interests would not suffer by a reduction, their duty required them to consult the Lake Shore Company with a view to the action necessary to be taken under the statute for that purpose. The plaintiff in error certainly had a right to suppose they would do this, since without it their two superior traffic officials would be guilty of a criminal offense. Instead of this, Pomeroy assumed in Guilford's absence to enter into an agreement for the systematic violation of the Act, in which the only "question which was left open" to Guilford was whether or not the arrangement ap-

plied to shipments reforwarded from Cleveland by roads other than the "Big Four" (pp. 31, 54, 58).

At this time William H. Newman was the president of the defendant corporation. There were five or six vice-presidents. There was also a board of directors numbering a dozen or more "controlling the corporate action of the defendant" (p. 27). But no evidence was introduced that any of the officers or directors had any knowledge whatever of the arrangement. Palmer testified:

> "I never had any conference or conversation on this subject with any officer of the defendant except Mr. Guilford and Mr. Pomeroy . . . I can not, at this time, testify definitely to any conference with any one except Mr. Pomeroy . . . I never had any letter from the president or officer of the defendant relating to this matter except the letter from Mr. Guilford (Ex. 18), and I never showed Mr. Guilford's letter to any officer of the defendant" (p. 32).

Between July 24, 1902, the day the arrangement was entered into, and December 6, following, the various consignments of sugar mentioned in the indictment, amounting to 69,944,966 pounds, were delivered by the sugar refining company to the plaintiff in error for shipment, and were prior to January 1, 1903, transported *via* the "Red Line" from New York to Cleveland, the full tariff rate being prepaid by the sugar company (p. 26).

Five claims aggregating $41,609.76 made up by one of Palmer's employees in accordance with Palmer's understanding as to the amount were presented by the latter. For convenience we will distinguish these claims by the numbers given them in Palmer's office, viz.: 30,240, 30,562, 30,975, 31,530 and 31,874.

1. No. 30,240, amounting to $2,351.33, was "for overcharge in rate on the all-rail sugar forwarded to Cleveland" (p. 51) in July (p. 60).

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*Neither of them was an officer of the Company.

2. No. 30,562, amounting to $11,982.86, was "for overcharge on Cleveland" sugar during the month of August (p. 51).

3. No. 30,975, amounting to $11,721.50, was "for overcharge on Cleveland sugar forwarded via Red Line during the month of September" (p. 52).

4. No. 31,530, amounting to $5,881.13, was "for overcharge on shipments of sugar forwarded to Cleveland via Red Line in October" (*Id.*); and

5. No. 31,874, amounting to $9,672.94 (there being no specific evidence on the point), may be assumed to have covered shipments made between November 1 and December 6 (pp. 27, 53).

Claim No. 30,240 was sent to Pomeroy with a personal letter from Palmer, dated August 19, in which Pomeroy was asked "to have this matter handled promptly" and cheque for the claim drawn to Palmer's order sent to him "at your earliest convenience" (p. 51). Nos. 30,562, 30,975 and 31,530, accompanied by letters in substantially the same form, were sent to Pomeroy September 16, October 14 and November 18, respectively.

None of the claims had then been paid, this doubtless owing to Guilford's continued absence. He presumably returned about this time, for on November 18, Palmer wrote to him asking him to settle the question left open at the interview of July 24 (pp. 54-55). This Guilford did in a letter to Palmer dated November 20 (p. 58), and four days later Pomeroy returned the four claims which had been presented up to that time, to Palmer, with a letter in which he asked Palmer to correct them in accordance with the latter's recent correspondence with Guilford (p. 60). Claim No. 31,874 was probably sent to Palmer, and similarly sent back for correction, after this time.

On January 13, 1903, Palmer returned the five claims "amended to conform to the basis named in Mr. Guilford's letter of November 20, 1902," to

Pomeroy "under personal cover" (p. 53). As originally presented they were stated to be, and on their face purported to be, claims for overcharge at the rate of six cents for each hundred pounds of shipment (p. 32). They were readjusted on the basis of six cents per hundred pounds for all shipments that went to Cleveland and were there reconsigned to points beyond, and four cents on the sugar that was delivered locally in Cleveland (p. 32). As readjusted they aggregated $39,440.30 (p. 27).

On March 18, 1903, Palmer addressed a "personal" letter to Pomeroy calling his attention to the fact that none of the claims had been paid (pp. 53-54). On March 21 Pomeroy replied that the claims were in Mr. Wilson's hands, who advised him that most of them would go through that month's account, and that he ought to be able to pay them by April 15, possibly before (p. 59). On March 23 Palmer again wrote to Pomeroy urging an adjustment (*Id.*), and on March 27th, the claims having been meanwhile audited by a travelling auditor representing the plaintiff in error (after which they were destroyed in the regular course of business so that the claims themselves were not available to either party at the time of the trial), the plaintiff in error gave Palmer "on account" of them a draft to Palmer's order for $26,141.81 drawn on the Chemical National Bank of New York by the cashier of the Bank of Buffalo, dated the previous day, which was liquidated out of the plaintiff in error's funds (pp. 27, 32, 59).

No evidence was introduced showing, or tending to show that any officer or director of the company had the slightest knowledge of the transaction upon which the indictment was based, much less that they were parties to or in any manner concerned in it. On the contrary, it would seem that Guilford and Pomeroy took pains to conceal the

transaction from the officials of the company. Some of the clerical force in the freight department probably knew what was going on. Certainly the company's "travelling auditor" upon whom the officials had a right to rely, should have discovered and reported it, instead of permitting the company's funds to be misappropriated. But there was an utter absence of evidence that the transaction was ever reported to any officer or director, or that they were even put upon inquiry as to its existence.

At the close of the evidence the defendant moved that the jury be directed to render a verdict of acquittal on the grounds, 1, that the Elkins Act did not apply and was not intended to apply to any of the acts specified in the indictment, done or omitted in respect of the transportation of property in interstate commerce prior to its taking effect; that there was no evidence tending to show that at any time after the going into effect of the Act the defendant (*a*) wilfully failed strictly to observe the published tariff rate, (*b*) was guilty of any violation of the Act in respect to the payment or giving or offering of any rebate made punishable under its provisions, or (*c*) committed any violation of the Act; and 2, that the indictment charged no violation of the Act, or of any other statute of the United States. The motion was denied and an exception taken (pp. 33-37).

The learned District Judge charged the jury in substance that if the alleged agreement of November, 1902, was made by officer or agent of the defendant acting within the scope of his employment, the defendant was bound by it" (p. 38).

After quoting the various provisions of the Elkins Act, and briefly reviewing the evidence, he concluded by telling the jury that he understood "from the argument of counsel that the defendant's

defense in the case is a denial of any criminal intent," and that the question for them to decide was, "what was the intent with which that check for $26,000 and odd was paid?"

> "Was it," he said, "paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause? That is the single question in this case for you to determine, and that question I leave for you to pass upon, upon the consideration of all the evidence in the case" (p. 39).

The court refused to charge the jury at the request of the plaintiff-in-error:

> "The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury" (24th Request, p. 44).

Numerous other requests to charge, presenting the question of the constitutionality of this provision in various forms were made and refused. The rulings of the court, the exceptions thereto and the errors therein appear from the specification of errors. To avoid repetition we omit further reference to these matters here.

When the jury returned to the court and inquired whether "the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law?" the court told them that they might convict the defendant under *any one of three theories* (p. 48).

The jury again retired, and subsequently rendered a general verdict of guilty (p. 49). Motions for a new trial (pp. 49-50) and in arrest of judgment (pp. 50, 61-65) were made and denied, where-

upon the court rendered the judgment now here for review.

SPECIFICATION OF ERRORS RELIED UPON.

The plaintiff in error contends that the Circuit Court erred:

FIRST.

In holding that Congress has power under the constitution to impute to the plaintiff in error the commission of a crime, and to punish it criminally, by reason of the matters described in the indictment (record, pp. 42 [13], 70 [17]; 80 [24] and 100 [23]; 1st assignment of error, p. 100).

SECOND.

"In holding that the said (Elkins) Act, by subjecting this defendant to the payment of a pecuniary fine for acts committed by its agents within the scope of their employment, in which the defendant did not in any manner participate, thus imputing to the defendant and making it punishable criminally for acts which it did not, in fact, commit, does not seek to deprive this defendant of its property without due process of law, in violation of Article V of the Amendments to the Constitution of the United States, and was not for that reason, unconstitutional and void" (4th assignment of error, p. 66).

"In holding that Section 1 of the said Act, which declares that in construing and enforcing its provisions the act of any agent employed by a carrier corporation, acting within the scope of his employment, shall in every case be also deemed to be the act of such carrier, does not infringe the rights, privileges and immunities of this defendant under the said Fifth Amendment, by subjecting it to criminal punishment for the acts of its employees to which it was not a party or privy, thus depriving it of property without due process of law, and that the said section was not for that reason un-

constitutional and void" (5th assignment, p. 66).

In charging the jury:

"Of course in the case of the defendant in this case, if a passenger agent or a person having to do with the traffic department of the business should make a contract for rebates on the carriage of freight, the corporation would not be bound by it; but if the contract is made by an officer or agent of the company, acting within the scope of his employment, the corporation is bound" (charge, p. 38; exception, p. 46; 41st assignment, p. 70).

In charging the jury as follows:

"Of course, there may be legitimate overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for $26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins Act and in the Interstate Commerce Act, or was it paid for some legitimate and proper overcharge or cause? That is the simple question in this case for you to determine and that question I leave for you to pass upon upon the consideration of all the evidence in the case" (charge, p. 39; exception, p. 46; 42d assignment, p. 70).

In refusing to charge the jury:

"The provisions of the Elkins Act that in construing and enforcing the first section thereof, the act of an agent of a carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury" (24th request, p. 44; exception, p. 47; 62d assignment, p. 72).

In refusing to charge the jury:

> "That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors or any officer beyond the agent who gave the rebate, then the defendant should be acquitted" (3d request, p. 40; exception, p. 46; 44th assignment, p. 70).

In refusing to charge the jury:

> "That the jury must not guess or conjecture, but the Government is bound to prove and to prove beyond a reasonable doubt not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation" (4th request, p. 40; exception, p. 46; 45th assignment, p. 70).

In refusing to charge the jury:

> "That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors and other executive officers, except said agent, then the defendant must be acquitted" (6th request, p. 41; exception, p. 46; 46th assignment, p. 70).

In refusing to charge the jury:

> "That even if the jury find a criminal intent in an agent or agents of the defendant, the jury cannot impute that intent to the defendant" (13th request, p. 42; exception, p. 47; 52d assignment, p. 71).

In refusing to charge the jury:

> "That the jury cannot make a finding of criminal intent against the defendant and base that finding solely on a finding of criminal intent in an agent or agents of the de-

fendant" (14th request, p. 42; exception, p. 47; 53d assignment, p. 71).

In refusing to charge:

"That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment in the absence of proof that in its corporate capacity or by direction of those controlling its corporate action it gave or authorized the giving of the rebate charged in the indictment" (16th request, p. 42; exception, p. 47; 55th assignment, p. 71).

In refusing to charge:

"That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted" (17th request, p. 42; exception, p. 47; 56th assignment, p. 71).

In refusing to charge:

"That even if the jury find as a fact that an agent or agents of the defendant gave a rebate as alleged in the indictment, and that thereafter such rebate was paid by or through other agents of the defendant corporation in Buffalo, still these facts are not of themselves sufficient to warrant a verdict of guilty against the defendant" (21st request, p. 43; exception, p. 47; 60th assignment, p. 72).

In refusing to charge:

"That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy and that as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation, then the defendant must be acquitted" (26th request, p. 44; exception, p. 47; 63d assignment, p. 72).

In refusing to charge:

"That in order to find that an agent or agents of the defendant was or were acting

within the scope of his or their employment the jury must find as a fact beyond a reasonable doubt, not merely that such agent or agents had authority to establish lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment" (27th request, p. 44; exception, p. 47; 64th assignment, p. 72).

In refusing to charge:

"The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment" (29th request, p. 44; exception, p. 47; 65th assignment, p. 72).

In refusing to charge:

"The presumption is that the defendant gave no direction or authority to any of its agents to commit an offense against the United States" (30th request, p. 44; exception, p. 47; 66th assignment, p. 72).

In refusing to charge:

"The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States" (32d request, p. 44; exception, p. 44; 67th assignment, p. 73).

In refusing to charge:

"That in order to find the defendant guilty, the jury must find that the evidence shows beyond a reasonable doubt that the defendant itself was guilty of a criminal intent separate and distinct from any criminal intent of any agent or agents of defendant whom the jury may find gave the rebate charged in the indictment" (34th request, p. 44; exception, p. 47; 68th assignment, p. 73).

In refusing to charge:

"That even if the jury find that some agent or agents of the defendant gave the rebate charged in the indictment and acted

with criminal intent in so doing, yet the jury must not impute such criminal intent to the corporation merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant" (35th request, pp. 34-45; exception, p. 47; 69th assignment, p. 73).

THIRD.

(*a*) In holding that the Elkins Act applied to the giving of rebates in respect of the transportation of property in interstate commerce transported prior to the time it went into effect (18th assignment, p. 67) and that the acts alleged in the indictment to have been done after it went into effect constituted a violation of that act (motion to direct acquittal, p. 22; renewed on the evidence, pp. 33-34; motion in arrest of judgment, pp. 62-63; 21st and 22d and 29th to 32d and 79th assignments, pp. 67-68, 74).

(*b*) In denying the defendant's motion that the jury be directed to acquit when it appeared by the evidence that the transportation of all the goods mentioned in the indictment, or as to which any evidence had been adduced was begun and completed before the passage of the Elkins Act and that there was no evidence showing any wilful feature on the part of the defendant strictly to observe the published tariff rate in respect of the transportation of any property transported after the going into effect or that the defendant had been guilty of any violation after the passage of the act in respect to the payment of any rebate made punishable by the act (pp. 36-37; 39th assignment, p. 69).

(*c*) In refusing to charge the jury:

> "The defendant cannot be convicted of a wilful failure strictly to observe the published tariff rates by reason of anything done or omitted by it, or its agents, after the transportation of property was completed"

(38th request, p. 45; exception, p. 47; 71st assignment, p. 73).

And that

"The alleged payment on Apr. 2nd, 1903, did not constitute a failure on its part strictly to observe its published rate" (39th request, p. 45; exception, p. 47; 72d assignment, p. 73); and

(*d*) In charging the jury in response to its question: "Does the payment of rebate after the passage of the Elkins Act on shipments made before the passage of the Act constitute a crime under the law?" as follows:

"To that I reply that it does, provided the payment was made with criminal intent" (charge, p. 48; exception, p. 49; 75th assignment, p. 73).

FOURTH.

In overruling the demurrer (7th assignment, p. 66); in holding that the acts described in the indictment constituted a crime (10th and 11th assignments, pp. 66-67); that the indictment apprised the defendant with reasonable certainty of the nature of the accusation (12th and 13th assignments, p. 67), and charged the time, place, nature and circumstances of the offense with clearness and certainty (14th and 15th assignments, *Id.*) that it was not defective for ambiguity and uncertainty (15th and 16th assignments, *Id.*); that it was not defective for the failure to allege the time when the shipments were made (19th and 20th assignments, *Id.*) or to allege that the sums therein mentioned were given in respect of the transportation of property in interstate commerce (23d and 24th assignments, pp. 67-68); that the indictment alleged a wilful failure on the part of the defendant strictly to observe its published tariff rates (25th and 26th assignments, p. 68) and that the acts alleged also constituted a violation of the Act in the offering, granting or giving of a rebate,

commission or discrimination (31st and 32d assignments, *Id.*).

FIFTH.

In denying the defendant's motions (*a*) that the United States attorney be required to inform the defendant whether it was charged with the giving of rebates under the Elkins Act, or with having wilfully failed strictly to observe the tariff rate under that Act; or with a violation of the Elkins Act, or of the original Interstate Commerce Act, and (*b*) that the court inform the defendant what its view was as to the nature of the crime charged (p. 24; 36th and 37th assignments, pp. 68-69).

SIXTH.

In charging the jury as follows:

> "The original Interstate Commerce Act provided that every common carrier carrying on commerce between the states, either alone or by a joint traffic arrangement with connecting roads, should print and keep open for public inspection, schedules showing the rates of fares and charges for transportation of passengers and property which any such carrier has established and which are in force at the time. There are various provisions in detail contained in the Act with reference to these schedules. They are to be filed in the office of the Commission of Interstate Commerce and posted in the stations of the roads, and *deviations from these scheduled rates are declared to be illegal.* When any such common carrier shall have established and published these rates, fares and charges in compliance with the provisions of this section the Act provides that 'it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any service in connection therewith, between any points as to which a joint rate, fare or

charge is named thereon than is specified in the schedule filed with the commission in force at the time'" (charge, p. 37; exception, p. 46; 40th assignment, p. 69).

SEVENTH.

In charging the jury:

"There are three provisions in this Act under either one of which, if you find that the evidence supports the charge, you may convict. If you find upon the evidence in this case that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

"Under another provision of this act if you find that this defendant has been guilty of a wilful failure to strictly observe the tariff filed specifying the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted or given any rebate, concession or discrimination upon the property transported in this case, 'whereby any such property shall by any device whatever be transported at a less rate than is fixed in the schedule', you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law" (charge, p. 48; exception, p. 49; 77th assignment, p. 74).

BRIEF OF THE ARGUMENT.

FIRST.

Congress is without power under the Constitution to impute to the plaintiff in error, and subject it to a criminal prosecution and punish-

ment, by reason of the matters described in the indictment.

This point is discussed in our brief in No. 57 (p. 34 *et seq.*).

SECOND.

If correctly interpreted by the Court below, that portion of the Elkins Act which declares that in construing and enforcing the provisions of the first section thereof, "the act, omission or failure of any officer, agent or other person acting for or employed by any common carrier, acting within the scope of his employment, shall in every case be also deemed to be the act, omission or failure of such carrier, as well as of that person," is unconstitutional. If misinterpreted by the Court below the case was submitted to the jury upon a fundamentally erroneous theory.

This question is discussed at length in our brief in No. 57 (Second Point). It is therefore only necessary to call attention to the rulings of the court in applying to the facts of this case its theory that the purpose and effect of the clause in question was to extend to criminal cases the principle of the civil law whereby masters are held to be liable in damages for the wrongful acts of their servants.

(a) *The view of court appears not only from the rulings on requests to charge and in the main charge, but also from what the court said in denying the motion to direct the jury to acquit.*

After quoting the first clause of the Elkins Act

which he construed as making the misdemeanor of the agent the misdemeanor of the corporation, the learned trial judge said:

> "Upon the evidence in this case, under the Interstate Commerce Act, it would be a proper question for the jury whether Mr. Guilford or Mr. Pomeroy had not committed a misdemeanor, and *therefore*, by this first provision in the Elkins Act, in my opinion, it is a question for the jury *whether the corporation, upon the same evidence, has not committed a misdemeanor*, particularly in view of the provisions in the second paragraph of the Act" (p. 34).

Referring to Mr. Guilford and Mr. Pomeroy, he continued:

> "They were traffic managers of the road, and they had authority, by virtue of their general position, to make contracts for traffic. *They were therefore the persons for whose acts, in accordance with the provisions of this act, the corporation was responsible;* and unless there is something in the subsequent provisions of the Elkins Act affecting the specific language of this first sentence, I do not see why that first sentence does not of itself create misdemeanor, which would be complete and perfect if there was nothing else added to the Act" (p. 35).

(b) *Specific statements of the rulings of the court in denying to the plaintiff in error the right to the presumption of innocence.*

In charging the jury the court said that

> "the original act did not contain any provision under which the corporation as such could be indicted" (p. 38).

and then continued, after quoting from the Elkins Act:

> "So the first sentence or section provides that an action done by such officer or agent which would be a misdemeanor under the original act, shall be a misdemeanor by the

corporation under the Elkins Act" (*Id.*, Exc., p. 46).

The court charged:

"That in order to justify a verdict of guilty against this defendant, it is not enough for the Government to prove that an agent or agents of the defendant offered to give or did give a rebate on sugar carried by this defendant" (Request 2, p. 40).

But destroyed the force of the instruction by saying to the jury:

"I so charge, gentlemen, if this rebate was given for any legitimate purpose you will acquit the defendant, but if it was not given for any legitimate purpose, but was given as a pure rebate in violation of the law upon that subject, then you should convict *the defendant*, if you find the other elements of the case sufficient in other respects" (*Id.*)

The court was requested to charge:

"That if the jury find as a fact that the evidence shows no more than this, that a rebate on sugar carried by this defendant was given by an agent of the defendant without the authority or knowledge of this defendant's president or executive officers or directors, or any officer beyond the agent who gave the rebate, then the defendant should be acquitted."

The court said:

"I understand that to raise the point whether a corporation *must* be held criminally liable for the acts of his agents."

Counsel for the plaintiff in error answered:

"It means exactly what I have written, and I think I am entitled to have it charged without modification, or have it refused. I mean that is my position."

The court thereupon continued its charge as follows:

"The Elkins Act provides in the language which I have read to you, that a corporation can be held criminally responsible if its

officer would be held criminally responsible for the same act" (*Id.*).

After quoting from the Act the court continued its charge as follows:

"That is the law applicable to this case, and I therefore decline to charge this third request as it is stated."

(Request 3, p. 40; Exc., p. 46; Assign. of Errors 44, p. 70.)

The court refused to charge the jury:

"That the jury must not guess or conjecture, but the Government is bound to prove, and to prove beyond a reasonable doubt, not only that an agent or agents of the defendant gave the rebate charged in the indictment, but also that the giving of such rebate was in fact authorized by those who controlled the corporate action of the defendant corporation."

In declining so to charge the court said:

"I decline to charge that in the language as put on the ground of the section of the statutes which I have just read."

(Req. 4, p. 40; Exc., p. 46; Assign. of Errors 45, p. 70.)

The court refused to charge:

"That even if the jury find as a fact that a rebate was given by an agent or agents of the defendant, yet if the jury find as a fact that the evidence is consistent with ignorance thereof by this defendant corporation's president, its directors or other executive officers, except said agent, then the defendant must be acquitted."

(Req. 6, p. 41; Exc., p. 46; Assign. of Errors 46, p. 70.)

The court refused to charge:

"That even if the jury find a criminal intent in an agent or agents of the defendant, the jury cannot impute that intent to the defendant."

(Req. 13, p. 42; Exc., p. 47; Assign. of Errors 52, p. 71.)

The court declined to charge

> "That the defendant cannot be convicted of criminal intent to commit the crime charged in this indictment, in the absence of proof that in its corporate capacity, or by direction of those controlling its corporate action, it gave or authorized the giving of the rebate charged in the indictment."

In declining to charge, the court said:

> "If by 'the company' is meant that those controlling its corporate action means any officer or person other than Guilford or Pomeroy."
>
> (Req. 16, p. 42; Exc., p. 47; Assign. of Errors 55, p. 71.)

The court declined to charge:

> "That if the jury find as a fact that there is no evidence one way or the other whether they who controlled the corporate action of the defendant authorized or knew of the giving of any unlawful rebate, then the defendant must be acquitted."

In declining so to charge, the court said:

> "I decline to so charge, understanding by the term, those who controlled the corporate action, to mean the board of directors or the immediate officers other than Guilford and Pomeroy."
>
> (Exc., p. 47; Assign. of Errors 56, p. 71.)

The court refused to charge:

> "That the jury cannot find the defendant guilty upon a finding that the defendant after the fact ratified or approved of the giving of the alleged rebate."
>
> (Request 20, p. 43; Exc., p. 47; Assign. of Errors 59, p. 72.)

We have cited authorities in our brief in No. 57, showing that this was error.

The court charged:

> "That there is no evidence that those who controlled the corporate action of the de-

fendant authorized or knew of the giving of the rebate alleged in the indictment,"

The court stating, however:

"I charge that if by controlling the corporate action is meant the directors or officers other than Guilford and Pomeroy."

(Req. 22, p. 43.)

The court refused to charge:

"The provisions of the Elkins Act, that in construing and enforcing the first section thereof the act of an agent of the carrier corporation shall be also deemed the act of such carrier, is unconstitutional and void, and must be entirely disregarded by the jury."

(Exc., p. 47; Assign. of Errors 62, p. 72.)

The court declined to charge:

"That if the jury find that the essential nature of the rebate alleged to have been given was deceit and secrecy, and that as a matter of fact the giving thereof was kept secret from all those who controlled the corporate action of the defendant corporation, then the defendant must be acquitted."

(Req. 26, p. 44; Exc., p. 47; Assign. of Errors 63, p. 72.)

The court refused to charge:

"That in order to find that an agent or agents of the defendant was or were acting within the scope of his or their employment, the jury must find as a fact, beyond a reasonable doubt, not merely that such agent or agents had authority to charge lawful rates, but must find also that such agent or agents had authority to give the rebate alleged in the indictment."

(Req. 27, p. 44; Exc., p. 47; Assign. of Errors 64, p. 72.)

Although the court charged that there was

"no presumption that the defendant gave any of its agents authority to give any rebate,

concession or discrimination charged in the indictment"

(Req. 28, p. 44);

yet it refused to charge:

"The presumption is that the defendant did not give any of its agents authority to give any of the rebates, concessions or discriminations charged in the indictment";

the court adding:

"I do not think there is any legal presumption about it one way or the other."

(Req. 29, p. 44; Exc., p. 47; Assign. of Errors 65, p. 72.)

The court also refused to charge:

"The presumption is that the defendant gave no direction or authority to any of its agents to permit an offense against the United States,"

the court saying:

"I do not think there is any question of presumption anyway in the matter."

(Req. 30, p. 44; Exc., p. 47; Assign. of Errors 66, p. 72.)

The court refused to charge:

"The presumption is that the defendant did not participate in, or counsel or advise the commission by any of its agents of an offense against the United States";

The court saying:

"I decline to so charge, and leave it expressly to the jury."

(Req. 32, p. 44; Exc., p. 47; Assignment of Errors 67, p. 72.)

The court refused to charge:

"That even if the jury find that some agent or agents of the defendant gave the rebate charged in the indictment and acted with criminal intent in so doing, yet the jury must not impute such criminal intent to the corporation, merely because such agent or agents had authority to fix lawful rates for the transportation of goods by the defendant."

(Req. 35, pp. 44-45; Exc., p. 47; Assign. of Errors 69, p. 73.)

The court refused to charge:

> "Even if the defendant can be guilty of a criminal intent, the jury cannot base a finding of such criminal intent solely on the finding of the criminal intent on the part of Fred L. Pomeroy."
>
> (Req. 37, p. 45; Exc. 47; Assign. of Err. 70, p. 73.)

The court refused to charge:

> "That if the jury are unable to determine whether either Nathan Guilford or Fred L. Pomeroy was guilty of criminal intent, that the jury must find a verdict of not guilty."
>
> (Req. 42, p. 45; Ex., p. 48; Assign. of Err. 73, p. 73.)

Finally, when the jury returned for further instructions, the court charged them:

> "If you find upon the evidence in this case that Mr. *Guilford or* Mr. *Pomeroy* was guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the *defendant* guilty . . . provided . . . you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law."
>
> (P. 48; Exception, p. 49; Assignment of Error No. 77, p. 74.)

THIRD.

The transaction set forth in the indictment was not punishable under the Elkins Act, which was passed after the property mentioned in the indictment had been transported.

The first count of the indictment alleged that under an agreement entered into *November 20, 1902,* the sugar company made "divers and various

consignments of sugars" which were "actually shipped and transported under the said agreement; but it is not alleged *when* they were so transported (p. 5). The second count is equally silent in this regard, the averment being that the plaintiff in error accepted 'certain sugars' for transportation" prior to the 2d day of April, 1903 (p. 7).

It appeared on the trial, however, that "the various consignments of sugar mentioned in the indictment, amounting to 69,944,966 pounds of such sugars" were delivered to the plaintiff in error between July 24, and December 6, 1902, and that they were transported from New York to Cleveland *prior to January 1, 1903* (p. 26).

The indictment charges the payment of the alleged "rebate and drawback" (first count, p. 5) or, "rebate, concession and discrimination (second count, p. 7) of $26,141.81 on April 2, 1903." The proof showed that on March 27, 1903, Palmer was given a draft for that sum "on account" of his various claims.

The Elkins Act was plainly prospective and not retrospective in its operation. It was intended to apply only to the payment of rebates in respect of shipments made after it became a law.

As the law stood when the Elkins Act took effect, transactions of the character set forth in this indictment which had then taken place, were, so far as corporations were concerned, perfectly innocent; at least there was no criminal liability on the part of the corporation. When Congress legislated in respect of transactions whereby property "*shall be* transported," etc., it obviously spoke as of the date of the Act. If, instead of doing so, Congress had undertaken to make the Act apply to shipments previously made, it would have been of more than doubtful validity, for a federal statute punishing as a crime an act done subsequent to a past completed transaction in inter-

state commerce could scarcely be defended as a regulation of commerce, or as falling otherwise within the proper sphere of Congressional action.

Our position rests upon the elementary rule of construction which requires that a statute must be given a prospective effect unless no other construction is permissible.

U. S. v. *American Sugar Co.*, 202 U. S., 563, 579.

U. S. Fidelity & G. Co. v. *Struthers*, 209 U. S., 306.

Cheu Heong v. *U. S.*, 112 U. S., 536, 559.

Murray v. *Gibson*, 15 How., 421.

U. S. v. *Bryan*, 9 Cranch., 374.

People ex rel. Ryan v. *Green*, 58 N. Y., 295.

State v. *Newark*, 40 N. J. L., 92.

In *U. S.* v. *American Sugar Co., supra*, the court said:

> "Future time and past time are directly opposite, and, by no inadvertence or intention can we believe or suppose that Congress having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other."

In *People ex rel. Ryan* v. *Green, supra*, it was held that a provision in a city charter to the effect that any person holding office under the city government who shall, during his term, accept a seat in the legislature shall be deemed thereby to have vacated his office, was prospective and did not apply to one who held office under the city government at the time of the passage of the act.

In *State* v. *Newark*, 40 N. J. L., 92, the court had under consideration a statute which enacted

> "that in all cases where public notice for a specified purpose is required by law to be given before proceedings are had for the

public sale of lands for unpaid taxes, no certificate of sale or tax title shall be set aside and holden for naught, by reason of any variance between the date of such notice and the actual publication thereof, provided that notice *shall have been, or shall be,* actually given for the specified number of days prior to such proceedings for public sale."

The court said:

"It is claimed that the words 'shall have been,' in the proviso, relate to the past; that their effect is to heal all irregularities in notices named in the act, which have occurred prior to its passage, and that the statute is intended to be retrospective. It is, however, obvious that all the terms used in this act are prospective, and apply only to the future. This is so, without dispute, in that part of the section which precedes the proviso. In the latter part of the sentence, the only words that are alleged to have retroactive signification are those already quoted—'shall have been.' *These words, and the following words 'shall be' will not, however, relate to acts that were past when the law was enacted. 'Shall have been' is the future perfect tense, which represents an event as completed in future time and 'shall be' represents what will take place in future time. If the legislature had intended to make the law retroactive, it would have been easy to express it by the use of the words has been* or *had been,* in the present or past perfect tense, or other equivalent words. For an instance of such expression see the Act of November 16th, 1795, concerning wills, Section Nine, construed in *Corlies* vs. *Little,* 2 Green, 384. The words there used are 'where any lands have been or shall be given or devised, &c., or have been or shall be thereby ordered or directed to be sold,' &c. The Court will not assume that the draughtsman of the act was a bad grammarian, in order to make the law retroactive, where there is no other expression in it which indicates such a purpose. There will

be no intendment in favor of a retroactive construction. *The rule is to construe all legislative acts prospectively, unless there be a clearly-expressed purpose to make them retrospective and the language used must be so clear and imperative as not to admit of doubt.*"

Applying the rule laid down in all the accepted authorities, we must assume that when Congress enacted that the payment of rebates by corporations, theretofore not a criminal offense, should constitute a crime, *when thereby property "shall be" transported* in interstate commerce at less than the published schedule rate, it did not mean *"when thereby, property 'shall have been'"* so transported.

FOURTH.

The acts set forth in the indictment did not constitute a crime under the Elkins Act, or under any other federal statute.

(*a*) In his opinion overruling the demurrer the learned District Judge after observing that the *Hanley* case, held "that the payment of a rebate from the scheduled rates violated the provisions of the act (of 1887) prohibiting deviations from the published rates," said:

> "The allegations of this indictment certainly support that charge sufficiently" (p. 11).

The learned District Judge had in mind (as appeared when he came to charge the jury; p. 37) the provision contained in the fourth paragraph of Section 6 of the original Interstate Commerce Act, as follows:

> "And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, col-

> lect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

Since it is made manifest by the language of the indictment itself that neither the pleader, nor the Grand Jury, intended to charge a violation of this provision, it did not lie within the province of the court below to change the nature and character of the charge in accordance with the strange notion evolved in the *Hanley* case that the *payment* of a rebate is the same thing as *charging, collecting or receiving* a less compensation than that specified in the published schedule.

But the indictment would be utterly worthless if subjected to this extraordinary method of reformation, for the provision of the Interstate Commerce Act above quoted, being in conflict with the second clause of the Elkins Act, making corporate carriers liable criminally only for *wilful* failures strictly to observe the published tariffs, was expressly repealed by the latter statute (section 4).

Moreover a corporation was never indictable under the Act of 1887, individuals only being criminally liable.

(*b*) In the opinion of the learned District Judge the fact that the indictment alleged the payment of the full rate and the subsequent payment of a rebate or concession was *also*

> "a sufficient allegation that *the payment* was a wilful failure to observe the published tariff" (p. 12).

The Grand Jury, however, presented the plaintiff in error upon another and wholly different theory. If, in spite of this, the indictment could be regarded from the standpoint last suggested, it is nevertheless fatally defective, *first*, in omitting to

allege *directly* any *wilful* failure on the part of the plaintiff in error, strictly to observe its published tariff, and *second*, in omitting any averment as to the time, place, or manner in which it was intentionally delinquent in that regard.

The court below thought that the *payment* of the rebate after the receipt of the schedule rate was equally the *receipt* of a less compensation that that specified in the schedule, and a wilful failure strictly to observe the latter. If so, did the default supposed to be charged either by way of "deviation" or "wilful failure" take place when the unlawful agreement was made, or when the rebate was paid? This is important. Whatever it may have been, the plaintiff in error was entitled to know the theory of the pleader, for upon the former hypothesis the prosecution was outlawed before the case was sent to the Grand Jury, and, as we have said, a corporation was never liable criminally for "deviation" under the Act of 1887.

(*c*) If the indictment is to be treated as an attempt to charge the giving of a rebate in violation of the Elkins Act it is fatally defective for lack of an agreement of unlawful advantage or discrimination.

Although the court below did not pass definitely upon the plaintiff in error's contention that this was an essential element of the offense, the pleader did; and he decided the point in accordance with our view. Consequently an attempt was made in both counts to charge "unjust and unlawful discrimination" (see concluding paragraphs, pp. 6, 7-8). But the only averment of this element is that contained in the third paragraph of each, to the effect that at all the times mentioned the published rate "was the rate charged, demanded, collected and received by the (defendant) from *other persons* than 'The American Sugar Refining Company' below

mentioned for performing for them like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions as those herein mentioned" (pp. 4, 7).

It is subsequently alleged, that on April 2, 1903, the defendant paid the Sugar Refining Company a sum of money "by way of rebate and drawback," &c. (first count, p. 5), and "as and for an unlawful rebate, concession and discrimination" (second count, p. 7); but it is not alleged in either count that similar rebates or discriminations were not allowed to other shippers, nor is any specific instance of actual discrimination otherwise shown. Both counts, therefore, fail to charge the giving of a rebate or the employment of any other device whereby advantage was given or discrimination practiced.

United States v. *Hanley, supra,* 71 Fed. Rep., 672.

(*d*) The indictment fails to charge a violation of the rebate provision of the Elkins Act in that the payments mentioned are not alleged to have been made in respect of the transportation of property in interstate commerce.

The allegation of the first count is that the sum therein specified was paid by the defendant

> "by way of the rebate and drawback hereinbefore set forth and agreed to, by and between the said companies, for the reduction of the said tariff schedules as aforesaid, said rebate and drawback being so paid upon the claims aforesaid and *in respect to the sugar* shipped and transported as aforesaid."

This is not equivalent to an averment that the defendant offered, granted or gave any particular rebate, concession or discrimination in respect of *the transportation* of any particular property whereby the same was transported at less than the published tariff rates, &c.

The allegation of the second count is merely that the defendant offered, granted and gave the money

"as and for an unlawful rebate, concession and discrimination." It is not even alleged that it was given in respect of the transportation of property.

(c) *In any view the indictment is bad either for duplicity, or for ambiguity.*

If, as the court below decided in sustaining the demurrer, the indictment charges in the same counts a "deviation" in violation of the original Interstate Commerce Law as well as a "wilful failure" in violation of the Elkins Act, and also charges, as the court held on the trial, the offense of giving rebates in violation of the latter Act, it is plainly bad either for duplicity, or for ambiguity and uncertainty.

When several acts relate to the same transaction, and together constitute but one offense, they may be charged in the same count, *but not otherwise.* Each count in an indictment must stand or fall by itself. *The jury cannot find a verdict of guilty as to one part and not guilty as to another part of the same count.* This strictness of pleading is necessary in order that the accused may not be in doubt as to the specific charge against which he is called to defend, and that the court may know what sentence to pronounce.

State v. *Smith,* 61 Maine, 386.

In the case cited there were two indictments under a statute which subjected travelling dealers and pedlars in intoxicating liquors to a penalty "for each offer to take an order, and for each order taken, and for each sale so made." One of the indictments contained two counts, one alleging that the defendant travelled from place to place "carrying for sale, and offering to obtain, and obtaining orders for the sale and delivery" of intoxicating liquors; and the other containing the same allegations with the additional averment that while so travelling the defendant obtained from a person named an order for the sale and delivery of certain

liquors. The second indictment contained four counts. The first count was similar to the second count of the first indictment with further averments of obtaining other orders; the second count set forth in addition to the general averments of the other counts that the defendant "did then and there offer to sell to one William S. Jacobs * * * and did offer to obtain an order for the sale of and delivery to the said William S. Jacobs, a certain quantity" of liquor, and also a similar averment of an offer to another person; the third count contained all the allegations of the other counts and the last was substantially the same as the first count of the first indictment.

The court, after referring to the provisions of the statute, said:

> "It is as much an offense to offer to take an order as it is to take one, and *vice versa*. To make a sale is as much an offense as either of the other prohibited acts. Each of these acts is independent of each other and constitutes a complete substantive offense. A conviction for one of these acts does not imply or involve a conviction for either or both of the others. Moreover, the penalty affixed to each of them is distinct and entire, and cannot be apportioned upon two or more of them. These several offenses being of the same nature, defined in the same section of the statute, and punishable with the same penalty, may doubtless be properly charged in separate counts of the indictment, though they cannot be embraced in the same count. In that case each count would present a single issue, and if sustained, would subject the accused to a certain specified penalty. Not so if all the three offenses, or either two of them, are grouped together in one count. There would then be as many issues as there are offenses charged, each requiring a different mode of proof. The evidence might warrant a conviction upon one of the offenses charged, but not upon the others. But

the jury cannot split up a count in an indictment, and find the accused guilty of a part, and not guilty of the balance; their verdict must be an entirety. Besides, what sentence in such case must the court pronounce upon the conviction of the accused? Must it impose the penalty affixed to one of the offenses only, or the sum of the penalties affixed to all of them? If the former, the accused escapes with a part of the penalty the law attaches to his acts; if the latter, the Court assume and decide that the accused has been convicted of several offenses charged in one count."

In *Rice* v. *Standard Oil Co.*, 134 Fed. Rep., 464, 465, 466, the court said:

"The Act makes a distinction between a contract and a combination or conspiracy. . . . Each of these things the act condemns as an unlawful thing. They are not confused in the act, but are mentioned as distinct offenses. Good pleading, whether it be in an indictment in a criminal proceeding or in a declaration in a civil suit, requires the same distinction to be observed. *If in a single count in an indictment the charge should be that the defendant entered into a contract, combination, and conspiracy in restraint of trade or commerce among the several States, it would be bad for duplicity.*"

If not objectionable on the ground of duplicity, then the indictment is certainly bad for ambiguity.

It is always necessary to specify on the face of the indictment

"the criminal nature and degree of the offense which are conclusions of law from the facts; and also *the particular facts and circumstances which render the defendant guilty of that offense.* 1st. In order *to identify the charge,* lest the Grand Jury should find a bill for one offense, and the defendant be put upon his trial in chief for another, without any authority."

1 *Stark, Cr. Pl.* (1st Ed.), 73.

If this indictment is susceptible of the construction that it charges, an offense under the Interstate Commerce Act, *and* an offense under the Elkins Act, either in the giving of rebates, *or* a wilful omission strictly to observe lawful tariff rates, *or* otherwise; *or* more than one offense of any character; *or* if it is uncertain what precise offense is charged, it is bad, for an indictment must be

> "free from all ambiguity, and leave no doubt in the minds of the accused and the Court of *the exact offense intended to be charged.*"
>
> *Ledbetter* vs. *United States,* 170 U. S., 606, 610.

FIFTH.

The Circuit Court erred in refusing to require the United States attorney to inform the defendant what the precise nature of the charge in the indictment was, and also in refusing to inform the defendant of its view in that respect.

We have seen that according to the construction put upon it by the court prior to the trial, the indictment might be regarded as sufficiently charging any one of three offenses. It may be that the court properly deferred until the trial, a definite ruling as to precise nature of the accusation; but it cannot be that the defendant should after that be still left in doubt as to the identity of the charge. The defendant took the only course open to it to obtain a ruling on this point. Its effort was without result. The charge threw no light upon the subject, and to this day it knows no more about the court's attitude in the matter than it did at the trial, for under a charge which permitted a verdict of guilty upon any one of three theories, the jury returned a general verdict of guilty.

SIXTH.

The court below erred in charging the jury concerning the provisions of the original Interstate Commerce Act, and particularly in charging them that "deviations from these schedules are declared to be illegal."

The portion of the charge in which the court made use of the language above quoted (charge, p. 37) was duly excepted to (p. 46) and is set forth at length in the 40th assignment of error (p. 69).

Standing alone, the instruction might perhaps have been regarded as harmless. But the court subsequently charged the jury that they might convict the defendant if they found

> "that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting or receiving . . . a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the Commission" (charge, p. 48; exception, 47; 77th assignment of error, p. 74).

The jury were thus instructed that they might find the defendant guilty not only of an offense not charged in the indictment, but of an offense defined and made punishable by a statute which had been repealed.

SEVENTH.

The Circuit Court erred in charging the jury that they might convict the defendant, (1) if they found Mr. Guilford or Mr. Pomeroy guilty of charging, demanding, collecting or receiving from the American Sugar Company a less compensation . . . than the rate specified in the sched-

ule; (2) if they found that the defendant had been guilty of a wilful failure to strictly observe the tariff filed or, (3) if they found that the defendant had granted or given any rebate, concession or discrimination, etc. Charge, p. 48; exception, p. 49; 77th assignment, p. 74.

The indictment did not attempt to charge a violation either of the 6th section of the Interstate Commerce Law, or of the second clause of the Elkins Act. The "deviation" provision of the Act of 1887, moreover, had been repealed by the Elkins Act. The offense of giving rebates, insufficiently and ineffectually alleged, was the only offense even attempted to be charged. Yet the jury were instructed that they might convict the defendant on any of these three supposed crimes. It is not only quite conceivable, but extremely likely, that it was convicted of violating the repealed law, or of a wilful failure strictly to observe its tariff. In either case it was guilty of no crime of which it stood accused. There was, of course, no failure on its part strictly to observe its tariffs at any time after the passage of the Elkins Act. If it failed to observe them at all it did so when, in November, 1902, three months before the passage of the Elkins Act it agreed to pay back a portion of the schedule rate. But, in any event no such offense was charged, nor, as we have shown, was any offense even attempted to be charged except that of giving an unlawful rebate.

Nothing could be clearer than that the jury was instructed that they might find the defendant guilty, and that by their verdict they may have convicted it, upon at least two different theories which were not charged in the indictment, or contemplated

either by the framer of the indictment or the Grand Jury that returned it.

CONCLUSION.

The judgment of the Circuit Court should be reversed and the proceedings remanded to that court with instructions to sustain the demurrer and discharge the defendant.

Respectfully submitted,

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